88-748

No. ——

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DATA CONTROLS NORTH, INC., THOMAS L. RUGER, PATRICIA A. RUGER, VIRGIL SCOTT, and MARIE SCOTT,
Petitioners

v.

EQUITABLE BANK, N.A.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the Third Circuit erred, in light of *Chevron Oil Co. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), when it applied the statute of limitations rule announced in *Data Access Sec. Sys. Litig.*, 843 F.2d 1537 (3rd Cir. 1988), to the Petitioner's federal securities claims.

LIST OF PARTIES

The Petitioners consist of Data Controls North, Inc.*, Thomas L. and Patricia A. Ruger, and Virgil and Marie Scott.**

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* Data Controls North, Inc., is a Maryland corporation owned 80% by Descomp, Inc., and 20% by John D. Greenwell, who is not a party to these proceedings. Descomp, Inc., is a Delaware corporation owned 50% by Thomas L. Ruger and 50% by Virgil Scott.

** The Petitioners invested, along with James L. Stritzinger, in Eagle Associates, a Maryland limited Partnership, and were known as the Eagle Plaintiffs in the proceedings below.

The original plaintiffs also included John T. Hill and Descomp, Inc. Plaintiffs Hill and Descomp, along with the Rugers and the Scotts, were investors in Wilmington House Associates, a Maryland limited partnership, and were known as the Wilmington House Plaintiffs in the proceedings below. The decision of the Third Circuit which is the subject of this Petition did not affect the Wilmington House Plaintiffs and they are not parties to this Petition.

Stritzinger's 10b-5 claims were not affected by either the District Court's decision or the Third Circuit's decision on appeal since his claims were governed by Delaware law and went to the jury. The remaining Eagle Plaintiffs, Data Controls North, and the Rugers and the Scotts, have petitioned for certiorari seeking review of that portion of the Third Circuit's decision which applied the rule announced in *Data Access* and which affirmed the District Court's decision to grant summary judgment as to their Rule 10b-5 claims on statute of limitations grounds. They have not sought certiorari as to the Third Circuit's decision to affirm the District Court's rulings on the Wilmington House claims and certain evidentiary rulings made during the trial.

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EQUITABLE BANK, N.A.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REFERENCE TO REPORTS OF OPINIONS BELOW

Decision on Appeal to the Third Circuit, *Hill, et al. v. The Equitable Trust Co., et al.*, 851 F.2d 691 (3rd Cir. 1988), filed July 14, 1988. Appendix A, 1a. Petition for Rehearing denied August 4, 1988. Appendix G, 169a.

Ruling on Motion to Dismiss the original Complaint—*Hill, et al. v. Equitable Trust Company, et al.*, 562 F. Supp. 1324 (D.Del. 1983), (*"Hill I"*). Appendix F, 126a.

Ruling on Motion to Dismiss the First Amended Complaint—*Hill, et al. v. Equitable Bank, N.A.*, 599 F.Supp. 1962 (D.Del. 1984) (*"Hill II"*). Appendix E, 89a.

Ruling on Motion to add RICO Counts to the Complaint—*Hill, et al. v. Equitable Bank, N.A.*, 109 F.R.D. 109 (D.Del. 1985). Appendix D, 79a.

Ruling on Motion to Dismiss the added RICO Counts—*Hill, et al. v. Equitable Bank, N.A.*, 642 F.Supp. 1013 (D.Del. 1986). (*"Hill III"*). Appendix C, 65a.

Ruling on Motion for Summary Judgment as to the Second Amended Complaint—*Hill, et al. v. Equitable Bank, N.A.*, 655 F.Supp. 631 (D.Del. 1987), ("*Hill IV*"). Appendix B, 19a.

Ruling on Equitable's Motion to Alter or Amend the District Court's decision on its Motion for Summary Judgment—*Hill, et al. v. Equitable Bank, N.A.*, 655 F.Supp. 654 (D.Del. 1987). Appendix B, 59a.

JURISDICTION

The Third Circuit affirmed the District Court's rulings in an opinion filed on July 14, 1988. App., *infra*, 1a. The opinion is reported at 851 F.2d 691 (3rd Cir. 1988). A Petition for Rehearing and Suggestion for Rehearing In Banc was timely filed. The Petition was denied by the Third Circuit on August 4, 1988. App., *infra*, 169a.

The Supreme Court has jurisdiction to review the decision of the Third Circuit pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

None.

STATEMENT OF THE CASE

On April 30, 1982, the Appellants filed suit against the Equitable Trust Company and the Mercantile Safe Deposit and Trust Company in the United States District Court for the District of Delaware. The Appellants claimed that they had been defrauded by Equitable, Mercantile, and others in their purchase of limited partnership interests in two partnerships, Wilmington House Associates, which took over an apartment complex near Wilmington, Delaware, and Eagle Associates, which took over a coal mine in West Virginia. Equitable Bank, N.A., a national banking association, succeeded to the interests of the Equitable Trust Company. A settlement

was reached with the Mercantile Safe Deposit and Trust Company early in the case. Mercantile was not a party in the Third Circuit.

Equitable filed a Counterclaim against seven of the eight original plaintiffs for moneys due Equitable as a result of loans made and letters of credit issued by Equitable in favor of these seven plaintiffs. These claims by Equitable were also the subject of related suits brought by Equitable in state and federal courts in Maryland. These cases were transferred to the United States District Court for the District of Delaware and consolidated with the action filed by the Appellants. The plaintiffs claimed that they were not liable for such amounts because they had been defrauded by Equitable in their investments. Since the defense to the counterclaims rested on claims of fraud, the parties agreed that Equitable's counterclaims would be determined by the Court after the jury's verdict on the claims filed by the plaintiffs.

The first Complaint alleged violations of the federal securities law as well as various common law violations including fraud and negligence. Jurisdiction was predicated on Section 22(a) of the Securities Act of 1933 [15 U.S.C. Section 77v(a)], Section 27 of the Securities Exchange Act of 1934 [15 U.S.C. Section 78aa], and pendent jurisdiction of the District Court over state law claims.

A Motion to Dismiss was granted on May 3, 1983 by the District Court, with leave to file an amended complaint.[1] On October 7, 1983, the Appellants filed their First Amended Complaint which alleged violations of the federal securities laws (Sections 10b and 20(a) of the Securities Exchange Act of 1934 [15 U.S.C. Sections 78j and 78t], Sections 12(2) and 15 of the Securities Act of

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[1] *Hill, et al. v. Equitable Trust Company, et al.*, 562 F. Supp. 1324 (D. Del. 1983), (*"Hill I"*). App., *infra*, 126a.

1933 [15 U.S.C. Sections 77*l* and 77o], conspiracy to commit various securities law violations) as well as various common law claims (fraud, negligence and conspiracy). A renewed Motion to Dismiss the Amended Complaint was denied in part and granted in part on August 16, 1984, leaving twenty counts in the First Amended Complaint.[2]

On September 10, 1985, the Appellants filed a Motion to Amend the First Amended Complaint to add counts claiming violations of 42 U.S.C. Section 1961 *et seq.*, of the Racketeer Influenced and Corrupt Organizations Act (RICO). The Motion was granted on December 20, 1985,[3] and the Appellants filed their Second Amended Complaint on January 2, 1986 which added four RICO counts to their existing claims. Equitable filed a Motion to Dismiss which was granted as to one RICO count and denied as to the remaining three.[4]

On October 29, 1986, Equitable filed its Motion for Summary Judgment directed at the entire Second Amended Complaint. On January 9, 1987, the District Court granted summary judgment as to certain of the counts filed by the Appellants and denied summary judgment as to the remainder.[5] Equitable filed a Motion to Alter or Amend the District Court's decision which the Court granted on March 9, 1987.[6] This amendment resulted in the dismissal of the 10b-5 claims of those plaintiffs

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[2] *Hill, et al. v. Equitable Bank, N.A.*, 599 F. Supp. 1962 (D. Del. 1984) ("*Hill II*"). App., *infra*, 89a.

[3] *Hill, et al. v. Equitable Bank, N.A.*, 109 F.R.D. 109 (D. Del. 1985). App., *infra*, 79a.

[4] *Hill, et al. v. Equitable Bank, N.A.*, 642 F. Supp. 1013 (D. Del. 1986). ("*Hill III*"). App., *infra*, 65a.

[5] *Hill, et al. v. Equitable Bank, N.A.*, 655 F. Supp. 631 (D. Del. 1987), ("*Hill IV*"). App., *infra*, 19a.

[6] This amendment is found at 655 F. Supp. 654, *et seq.* App., *infra*, 59a.

whose claims the District Court had determined were governed by Maryland law.

The remaining counts were tried before a jury in a trial which lasted from April 28, 1987 to May 19, 1987.[7] The jury returned a verdict in favor of Equitable. The Court thereafter determined the Counterclaims filed by Equitable and entered judgment on June 22, 1987, in favor of Equitable on the jury verdict and on the Counterclaims.[8] On July 1, 1987, those Appellants who were the subject of Equitable's Counterclaims filed a Motion to Alter or Amend the Judgment as to interest due on the Counterclaims. The District Court granted the Motion on July 31, 1987.[9]

The Wilmington House Plaintiffs appealed the dismissal of their claims to the Third Circuit. The Eagle Plaintiffs appealed certain evidentiary rulings made by the District Court during the trial. In addition, those Eagle Plaintiffs (the Petitioners here) whose 10b-5 claims had been dismissed by the District Court because they

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[7] The counts which went to the jury consisted of the following:

1. Violation of 10b-5 (Stritzinger only)
2. Violation of 10b-5 (Stritzinger only)
3. Common Law Fraud (All Eagle Investors)
4. Violation of 10b-5 (Stritzinger only)
8. Conspiracy to Violate 10b-5 (Stritzinger only)
9. Common Law Conspiracy (All Eagle Investors)
10. Aiding & Abetting Violation of 10b-5 (Stritzinger only)
12. Negligent Misrepresentation
13. Negligence
21. Direct Violation RICO (All Eagle Investors)
22. Conspiracy to Violate RICO (All Eagle Investors)

[8] App., *infra*, 171a.

[9] App., *infra*, 173a.

were governed by Maryland Blue Sky law also appealed to the Third Circuit.

On July 14, 1988, the Third Circuit affirmed the rulings and decision made by the District Court.[10] Because the Third Circuit's ruling as to those claims of the Eagle Plaintiffs governed by Maryland law was based upon the retroactive application of the statute of limitations rule announced in *Data Access*, a Petition for Rehearing and Suggestion for Rehearing In Banc was filed by the Petitioners herein. This Petition was denied on August 4, 1988. App., *infra*, 169a.

REASONS FOR GRANTING THE PETITION

The rule announced in *Data Access*[11] should not have been applied retroactively to the Petitioners' 10b-5 claims. The Third Circuit sitting in banc declined in *Data Access* to determine whether the new rule should apply retroactively. The dissent in *Data Access*, which welcomed the new rule, argued that the new rule should be applied prospectively only, since "today's action of our court in overruling those cases and adopting a federal statute of limitations clearly overturns past circuit precedent on which these plaintiffs may have relied.[12]

At the time of the decision in *Data Access*, the Petitioners' appeal was pending. The Circuit asked for rebriefing on whether the rule in *Data Access* should be ap-

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[10] The Third Circuit's Opinion is found at 851 F.2d 691 (3rd Cir. 1988). App., *infra*, 1a.

[11] The Third Circuit's adoption of a statute of limitations for claims alleging a violation of Section 10b and Rule 10b-5 based upon the "express limitations sections of the Securities Exchange Act of 1934" (843 F.2d at 1551), or "one year after the plaintiff discovers the facts constituting the violation and in no event more than three years after such violation, (843 F.2d 1551), is challenged by the Petitioners herein. No other federal court has adopted such a rule. See, cases cited in footnote 15, *infra*, and the discussion beginning at page 8 as to the law on this subject prior to *Data Access*.

[12] *Data Access*, *supra*, at page 1553.

plied to the Petitioners' case. On July 14, 1988, a unanimous panel determined that the *Data Access* rule would be applied retroactively and affirmed the District Court's decision granting summary judgment on statute of limitations grounds as to the 10b-5 claims of the Petitioners.

For reasons which follow, the Petitioners contend that the Third Circuit erred because it incorrectly applied the principles announced in *Chevron Oil Co. v. Huson, supra.*

THE RULE IN *CHEVRON OIL CO. V. HUSON*

The Supreme Court set forth in *Chevron Oil Co. v. Huson* a three-part test for determining whether a court should not apply a newly announced rule of law retroactively.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, see, *e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [392 U.S. 481, 496 (1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen v. State Board of Elections*, [393 U.S. 544, 672, (1969)]. Second, it has been stressed that "we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, [381 U.S. 618, 629 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, [395 U.S. 701, 706 (1969)].

Chevron, 404 U.S. at 106-107.

The Third Circuit, in deciding to apply the new *Data Access* statute of limitations rule to the 10b-5 claims

of the Petitioners, ruled that neither the first nor the third criteria of the *Chevron* case required that the *Data Access* rule be applied prospectively only.[13] The Petitioners disagree. The rule announced in *Data Access* overturned clear past precedent upon which the Petitioners relied (first criteria). In addition, the application of this new rule to the Petitioners' claims produced a substantial inequitable result (third criteria) in that the District Court's failure to apply the correct statute of limitations under the law existing prior to *Data Access* has denied them their day in court.

A. The *Data Access* Decision Announced A New Rule Of Law Which Overruled Clear Past Precedent On Which The Petitioners Relied

The first criteria under the *Chevron* case consists of two parts: overruling clear past precedent; and reliance by the litigants on past precedent.

1. *Overruling Clear Past Precedent*

The rule as to the limitations period to be applied to Rule 10b-5 cases prior to *Data Access* was clear. Where a federal statute does not specify the limitations period applicable to an action, the federal court should apply the most appropriate or analogous state statute of limitations period. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1374, 47 L.Ed.2d 668 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966); *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946).

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[13] The second criteria, whether retrospective operation would further or retard the operation of the new rule, was considered neutral by the Third Circuit. The Petitioners agree that this part of the *Chevron* test does not militate for or against retrospective application of the *Data Access* rule.

The Supreme Court stated in *Ernst & Ernst v. Hochfelder, supra*, at page 210, n.29, that "[s]ince no statute of limitations is provided for civil actions under Section 10(b) [of the Securities Exchange Act of 1934], the law of the limitations of the forum State is followed as in other cases of judicially implied remedies." The courts have presumed that the intent of Congress in such cases is to defer to the policy of the forum state, rather than to a policy of national uniformity. *Holmberg v. Armbrecht, supra.*

This principle has been accepted and restated by every case decided in the Third Circuit which has dealt with the question of determining the limitations period that should be applied to Rule 10b-5 claims. Thus, in *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3rd Cir. 1979), Judge Gibbons stated that "the Supreme Court has announced the rule that we must look not for an analogous federal limitations period, but for an analogous forum state limitations period. [Citing *Johnson v. Railway Express Co., supra*, and other cases.]" Judge Gibbons stated that this had been the rule "for many years, and an inferior federal court is not free to change it." 611 F.2d at 454. The concurring and dissenting opinions did not disagree with this basic proposition.

In *Biggans v. Bache Halsey Stuart Shields*, 638 F.2d 605 (3rd Cir. 1980), the Third Circuit addressed the limitations issue again in a Rule 10b-5 case. The requirement that the most analogous state law be borrowed for statute of limitations purposes was not questioned:

> The district court recognized that the absence of a federal statute expressly providing a period of limitations for private actions based on section 10(b) of the Securities Exchange Act required the selection of an appropriate limitations period from the law of Pennsylvania, the forum state. 638 F.2d at 607.

In *Biggans*, the Court's majority again adopted the common law fraud provisions as governing the Rule 10b-5 claims:

> We therefore conclude that the reasoning which underlay the decision of this court to apply the New Jersey common law fraud statute of limitations in *Roberts* compels a similar result in this case. *Where the state Blue Sky law does not provide the plaintiff with a cause of action for the relief requested, but common law does, and where the state legislature framed its statute to supplement, rather than supplant, available common law remedies, it is the common law limitations period which must be applied in federal securities actions.*

635 F.2d at 610. (Emphasis added.)

The highlighted language in the above quotation constituted the law of the Third Circuit prior to *Data Access* and governed the statute of limitations applicable to the Petitioners' claims which were filed on April 30, 1982, after *Roberts* and *Biggans* were handed down. The decisions of the Third Circuit have followed this ruling in *Biggans*. *See*, for example, *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 192 (3rd Cir. 1981), and the exhaustive opinion by Judge Latchum in *Hill v. Der*, 521 F.Supp. 1370 (D.C.Del. 1981).[14] No decision within or without

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[14] Judge Latchum's opinion reviewed the case law in the Third Circuit. While the presumption was that a state's Blue Sky law would be borrowed in a 10b-5 case, "[t]his presumption [was] subject to one significant exception. If the underlying state Blue Sky law does not afford a civil damage action to remedy the behavior challenged by the 10b-5 claim and the plaintiff would be relegated to a common law fraud action for state relief, the courts must apply the fraud limitations provision to the 10b-5 action. *Accord, Sharp v. Coopers & Lybrand*, 649 F.2d 175, 191-192 (3rd Cir. 1981); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 894 (5th Cir. 1979). Beyond these constraints, however, the district courts are free to fill the interstices left open by Congress' failure to enact a limitations provision for remedies implied under the securities laws." 521 F. Supp. at 1382-1383, quoted approvingly in the *Data Access* opinion at 843 F.2d 1541-1542.

the Circuit has questioned the basic rule that the limitations period in Rule 10b-5 cases is found by examining state law.[15]

The *Data Access* opinion, however, changed all this in announcing a new statute of limitations rule which would govern all Rule 10b-5 claims no matter where they were filed in the Third Circuit and no matter who the defendant was. The dissent in *Data Access* concluded that this was a clear break with past precedent:

> In light of the precedent in this court applying state statutes of limitations to federal securities claims, *see*, *Biggans*, 638 F.2d 605; *Roberts*, 611 F.2d 450, and in view of the fact that none of the Supreme Court cases cited by the majority even considered, much less clearly overruled, Third Circuit precedent dealing with securities fraud, today's action in overruling those cases and adopting a federal statute of limitations clearly overturns past circuit precedent on which these plaintiffs may have relied.

843 F.2d at 1553.

Indeed, the majority opinion, which did not reach the issue of retrospectivity, announced at the outset that it was "reexamin[ing] both the reasoning and holdings in *Biggans* and *Roberts* . . .," and that it was able to do

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[15] The other circuits all require the application of state laws: *See, Cook v. Avien, Inc.*, 573 F.2d 685, 694 (1st Cir. 1978); *Armstrong v. McAlpin*, 699 F.2d 79, 86-87 (2nd Cir. 1983); *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980); *Breen v. Centex Corp.*, 747 F.2d 907, 910-911 (5th Cir. 1984); *Marx v. Centran Corp.*, 747 F.2d 1536, 1551 (6th Cir. 1984); *Andres v. Heingold Commodities, Inc.*, 771 F.2d 184, 186 (7th Cir. 1985); *Morris v. Stifel, Nicolaus & Co., Inc.*, 600 F.2d 139, 146 (8th Cir. 1979); *Vucinich v. Paine Webber, Jackson, & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984); *Loveridge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1983); *Freidlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1509 (11th Cir. 1986); *Forestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977).

so "freely *and without constraint of panel precedents* because we are assembled in a court in banc." 843 F.2d at 1538. (Emphasis added.) After an extensive analysis of Third Circuit law, the majority opinion concluded that "[o]ur present case law calls for difficult interpretations of state limitations periods." 843 F.2d at 1541.

The Court went on to announce a new limitations period because the Supreme Court "directed us to apply the most analogous federal statute of limitations to certain federal causes of action." [16] Notwithstanding the concerns of the judges in *Roberts* that the Third Circuit "could not 'borrow' federal statutes 'because an inferior federal court is not free to change' the practice, 611 F.2d at 454, and that the Supreme Court 'has rarely deviated from the normal rule of looking to state [rather than federal] statutes,' *id.*, at 463, the Supreme Court in *DelCostello* [*v. International Bhd. of Teamsters*, 462 U.S. 151 (1983)] and [*Agency Holding Corp. v.*] *Malley-Duff*, [107 S.Ct., 97 L.Ed.2d 121 (1987)] has changed all that." 843 F.2d 1550.

Despite this, the three judge panel in the Petitioners' case concluded that the rule announced in *Data Access* was not completely " 'an issue of first impression whose resolution was not clearly foreshadowed,' " [citing *Chevron*, 404 U.S. at 106], nor that *Data Access* "signaled an abrupt change in clearly established laws, ..." 851 F.2d at 698. App., *infra*, 13a. It reached this conclusion by reciting the dissents and concurring opinions in *Roberts* and *Biggans* and stating that "the federal limitations period were alluded to in the dissenting opinions in both *Roberts* and *Biggans*, . . ." *Id.* In addition, the dissenting and concurring opinions, as well as opinions such as that by Judge Latchum in *Hill v. Der*, *supra*, showed

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[16] 843 F.2d at 1540, referring to *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, —— U.S. ——, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), and *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

that "the law in the circuit on this point could fairly be described as uncertain." 851 F.2d at 697. App., *infra*, 12a.

There are two problems with the Panel's conclusion. First, the decision to craft a new statute of limitations rule from federal law was a clear break with past precedent. As noted above, every Third Circuit opinion and every other circuit has held that state law was the proper source for the statute of limitations to be applied in 10b-5 cases.

Second, the absence of "bright-line guidance", *Data Access*, 843 F.2d at 1541, in prior Third Circuit case law as to which state statute of limitations to apply in each and every case does not mean that there were no precedents which governed the Petitioners' 10b-5 causes of action. On the contrary, the Third Circuit holdings in *Roberts* and *Biggans* were clear. As stated by Judge Latchum in *Hill v. Der*, *supra*: "If the underlying state Blue Sky law does not afford a civil damage action to remedy the behavior challenged by the 10b-5 claim and the plaintiff would be relegated to a common law fraud action for state relief, the courts must apply the fraud limitations [as opposed to the Blue Sky limitations] to the 10b-5 action." 521 F.Supp. at 1383.

The *Data Access* rule was a new principle of law which overruled clear past precedent. It fashioned a new statute of limitations period from federal law. It also overruled clear past precedent which required that where a plaintiff's securities fraud claim could not have been brought against the defendant under the applicable state Blue Sky laws, the district court was to apply the state's statute of limitations provision for fraud.[17]

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[17] The Petitioners have claimed in these proceedings that the District Court should have applied Maryland's general statute of limitations period to their 10b-5 causes of action and not Maryland's Blue Sky limitations period. They base this claim on the fact that they sued a bank, which is not a party which they could have

Where the statute of limitations period was clear under prior law, the Third Circuit and the Supreme Court have affirmed the refusal to apply a new limitations period retrospectively. *St. Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987); *Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3rd Cir. 1986). Where the statute of limitations period was not clear under prior law, a new limitations period would be applied retrospectively. *Goodman v. Lukens Steel Co.*, 482 U.S. ——, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987). *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3rd Cir. 1985). In the instant case, the prior precedent was clear and the rule announced in *Data Access* was a clear break with past precedent.

2. *The Clear Past Precedent Was One Upon Which The Litigants Relied*

The second part of the first criteria of the *Chevron* test is that the past precedent must be one on which the litigants may have relied. While the Third Circuit may be free to reexamine its prior holdings and the rulings of the Supreme Court regarding the sources of limitations in implied causes of action, the parties (and their attorneys) litigating cases in the district courts are not so fortunate. They must rely on the law as it exists at the time they present their arguments to the court. The law was clear: state law was the source of the limitations period and where no cause of action existed under the state Blue Sky law, the applicable period of limitations was found in the state general fraud provisions. Indeed, counsel for the Petitioners was asked during oral argument whether federal law had been relied on in

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sued under Maryland Blue Sky law. For the same reasons, in interpreting an identical New Jersey statute, the dissent in *Data Access* concluded that New Jersey's general statute of limitations should apply because the plaintiffs there had sued an attorney and an accountant, neither of which were subject to suit under the New Jersey Blue Sky law.

arguing this issue. The answer was no. The briefs and opinions of the District Court make no reference to any federal law as a source of the limitations period.

Despite this, the Panel concluded that the Petitioners "could not reasonably have relied on any ruling of this court setting out the appropriate section 10(b) and Rule 10b-5 statute of limitations." 851 F.2d at 697. App., *infra*, 11a-12a. The Petitioners respectfully disagree in light of the clear language of *Roberts* and *Biggans* that the statute of limitations governing their suit against Equitable Bank was to be found in Maryland's general fraud provisions.

The cases relied upon by *Data Access* in allowing the Third Circuit to take a fresh look at the statute of limitations question and borrow federal as opposed to state law were all decided after the Petitioners filed suit in 1982. Thus, the Supreme Court's ruling in *DelCostello* and *Malley-Duff*, no matter how much they are welcomed by the Third Circuit in resolving its concerns about the statute of limitations to be applied in 10b-5 cases, are inapplicable to the Petitioners claims filed in 1982.

Accordingly, the first prong of the three part test announced in *Chevron* has been satisfied. *Data Access* announced a new rule which overturned clear past precedent upon which the Petitioners relied.

B. Prospective Application of The *Data Access* Rule Would Neither Further Nor Retard The Operation Of The Rule

Limiting the application of the rule announced in *Data Access* to new cases would neither further nor retard its application. 851 F.2d at 698. App., *infra*, 13a. The Petitioners agree. The second prong of the *Chevron* test, therefore, is neutral.

C. Retrospective Application Of The *Data Access* Rule Would Produce Substantial Inequitable Results

The Third Circuit concluded that application of the *Data Access* rule to the Petitioners' 10b-5 claims would not produce substantial inequitable results because "the [Petitioners] fare the same whether our new *Data Access* holding [is applied to their case or whether] the Maryland statute applies." 851 F.2d at 698. App., *infra*, 13a. This conclusion is in error because it assumes that the District Court's application of Maryland's Blue Sky limitations period to the Petitioners' claims was correct. It was not. The District Court determined that Maryland law applied to the Petitioners' 10b-5 claims. The Petitioners do not disagree with this conclusion. However, the District Court went on to conclude that the Blue Sky provisions provided the proper statute of limitations to be applied to the Petitioners' 10b-5 claims. Since the Maryland Blue Sky law provides for an absolute three year statute of limitations, and since the Petitioners filed their Complaint three years and five months after the purchase of their limited partnership interests in Eagle, the Petitioners' claims were filed too late. Accordingly, summary judgment was granted in favor of Equitable Bank.

The Petitioners appealed, arguing that the proper statute of limitations was to be found in Maryland's general fraud provision since they could not have sued Equitable Bank for a violation of Maryland's Blue Sky provisions. They relied upon *Roberts* and *Biggans*, which directly held that "[w]here the state Blue Sky law does not provide the plaintiff with a cause of action for the relief requested, but common law does, and where the state legislature framed its statute to supplement, rather than supplant, available common law remedies, it is the common law limitations period which must be applied in federal securities actions." 635 F.2d at 610.

The language in Maryland's Blue Sky law did not permit the Petitioners to sue Equitable Bank under that law. Section 11-703(a) makes a person civilly liable to seller or buyer where a security is sold in violation of the Maryland Blue Sky law. App., *infra*, 174a. Subsection (c)(1) defines who else is liable along with the seller or the buyer:

> Every person who directly or indirectly *controls* a person liable under subsection (a) of this section, every *partner*, *officer*, or *director* of the person liable, every person occupying a *similar* status or performing similar functions, every *employee* of the person liable who materially aids in the sale or purchase, and every *broker-dealer* or *agent* who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the person liable, unless the nonseller or nonbuyer who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. (Emphasis added.) (App., *infra*, 175a.)

A bank which either directly or indirectly violates 10b-5 would not be amenable to suit under Section 11-703 because it is not listed in Subsection (c). Thus, the application of the period of limitations in Section 11-703(f) (App., *infra*, 175a) to the Appellants' federal security law claims was incorrect in light of *Roberts* and *Biggans*.

It is also clear that Maryland's Blue Sky provisions were enacted "to supplement, rather than supplant, available common law remedies. . ." *Biggans*, *supra*, at 610. Section 11-703(i) of the Maryland Blue Sky law provides in part as follows (App., *infra*, 176a):

> The rights and remedies provided by this title are in addition to any other rights and remedies that may exist in law or in equity. . . .

Therefore, the holdings in *Roberts* and *Biggans* required that the District Court apply the general fraud provisions found in Maryland law and not the Blue Sky provisions. If so, tolling would have been allowed.

One of the significant "other rights and remedies", Section 11-703(i), a person governed by Maryland has is *Md. Cts. & Jud. Proc. Code Ann.* Section 5-203 which provides for the tolling of the commencement of a cause of action if the plaintiff is kept in ignorance of the cause of action by the fraud of the adverse party. App., *infra*, 177a. Clearly this section allows for tolling.

More importantly, however, Maryland has a discovery rule which has been held to apply to every cause of action. *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981). This includes general fraud causes of actions. Therefore, had the District Court adopted the general fraud provisions to govern the statute of limitations applicable to the Petitioners' 10b-5 aciton, tolling would have been available and the Petitioners' 10b-5 causes of action would have gone to the jury.

The District Court, however, felt compelled to follow a Fourth Circuit case which had held that a 10b-5 cause of action was to be governed by the statute of limitations found in Maryland's Blue Sky law at Section 11-703(f). *O'Hara v. Kovens*, 625 F.2d 15 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). All the Fourth Circuit did in that case was refuse to apply equitable tolling where the plaintiffs there claimed one of them was incompetent while the statute ran. It is also significant that the *O'Hara* court distinguished *Roberts v. Magnetic Metals Co.* because the statute considered by the *Roberts* court did not provide a remedy for sellers of securities while the Maryland Blue Sky law did. "Thus, the problem faced in *Roberts* is not presented here, *i.e.*, whether a court should apply a blue sky statute of limitations

when the blue sky law does not regulate the behavior being challenged." 625 F.2d 18, n.3 (citations omitted).[18]

Thus, the Fourth Circuit has not spoken as to what it would do if confronted with a 10b-5 case where a plaintiff could not sue a defendant under the Maryland Blue Sky statute. Indeed, the language quoted above implies that it would follow the reasoning in *Roberts* and *Biggans* and apply the Maryland general fraud provisions. Certainly the present state of Fourth Circuit law does not support the Panel's assertion in the instant case that the Petitioners "were obviously on notice of the time period adopted by the Court of Appeals for the Fourth Circuit years before the cause of action in this case had accrued." 851 F.2d at 698.

The District Court should have analyzed *O'Hara v. Kovens* more closely. If it had, it would have realized that the Fourth Circuit had not provided clear cut law on the issue of limitations where a plaintiff could not have sued under the Maryland Blue Sky law. Pursuant to *Roberts* and *Biggans*, Maryland's general fraud law provisions should have been borrowed. If they had, equitable tolling would have applied and the Petitioners' 10b-5 claims would have gone to the jury.

The Third Circuit erred when it concluded that the third prong of the *Chevron* test was not satisfied because the Petitioners were no better off under the new *Data Access* rule than they were under the preexisting case law. This is because it failed to realize that under the case law in existence prior to *Data Access*, Maryland's general fraud provisions should have applied. Failure to apply the prior case law resulted in the Petitioners

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[18] The *Roberts* court commented on an earlier Fourth Circuit decision dealing with the proper statute of limitations to be applied and found it unpersuasive for the same reason. "We find *Fox* [*v. Kane-Miller Corp.*, 542 F.2d 915 (4th Cir. 1976)] unpersuasive, if for no other reason than its failure to even make note of the fact that the statute relied upon did not provide a cause of action for anyone other than a buyer." 611 F.2d at 455.

being denied their day in court, a substantial inequitable result.

CONCLUSION

The Third Circuit erred when it held that the rule announced in *Data Access* should be applied retrospectively to the Petitioners' Rule 10b-5 claims. Two prongs of the test announced in *Chevron Oil Co. v. Huson, supra*, require that the rule in *Data Access* be applied prospectively only. This is because *Data Access* announced a new rule which overturned clear past precedent in the Third Circuit. This is also because the District Court erred in selecting the proper statute of limitations to be applied to the Petitioners' rule 10b-5 claims. The Third Circuit's decision to apply *Data Access* prevents the Petitioners from reversing the District Court's error which works a substantial inequitable result on them by denying them the right to have their Rule 10b-5 claims heard by a jury.

In addition, the retrospective application of the *Data Access* rule to a pending Rule 10b-5 case is improper since it works to deny all those Rule 10b-5 cases pending at the time of the decision in *Data Access* the right to have their claims heard under the rule of law existing at the time the plaintiffs filed their case. This is because the absolute three year rule announced in *Data Access* is shorter than many state statutes of limitations in the Third Circuit. Accordingly, certiorari should be granted so that the decision handed down in the instant case can be reversed. The Third Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Rule 17.1(c).

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 87-3575

JOHN T. HILL, DESCOMP, INC., DATA CONTROLS NORTH, INC., VIRGIL AND MARIE SCOTT, THOMAS L. AND PATRICIA A. RUGER, AND JAMES R. STRITZINGER,
Appellants,

v.

THE EQUITABLE TRUST COMPANY AND MERCHANTILE SAFE DEPOSIT & TRUST COMPANY,
Appellee.

Argued March 7, 1988

Submitted on Rebriefing May 6, 1988

Decided July 14, 1988

Rehearing and Rehearing En Banc

Denied Aug. 4, 1988

Before WEIS, GREENBERG and ALDISERT, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

The principal issue here is whether our in banc decision in *In Re: Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d. Cir. 1988), should be applied in this appeal

from a judgment based on two earlier, inconsistent panel opinions of this court. Because plaintiffs had no reasonable basis for reliance on our then-existing precedent, we will apply the in banc holding retroactively. Although it adopted a different rationale, the district court reached the same ultimate result that our in banc ruling requires. Accordingly, we will affirm.

The district court entered summary judgment on several counts of a multi-claim complaint and, in accordance with the jury's answers to interrogatories, granted judgment for defendant on the remaining counts. Plaintiffs have appealed the judgments on some, but not all, counts.

This litigation is an outgrowth of the plaintiffs' unsuccessful investments in two limited partnerships. The factual background is complex, and the various legal issues have led to five published opinions by the district court. *Hill v. Equitable Trust Co.*, 562 F. Supp. 1324 (D. Del. 1983); *Hill v. Equitable Bank, Nat'l Ass'n*, 599 F. Supp. 1062 (D. Del. 1984); *Hill v. Equitable Bank, N.A.*, 642 F. Supp. 1013 (D. Del. 1986); *Hill v. Equitable Bank*, 655 F. Supp. 631 (D. Del. 1987), *amended by separate opinion*, 655 F. Supp. 653 (D. Del. 1987).

The events relevant to this appeal, however, need only be summarized. In November 1977, plaintiffs John T. Hill, Thomas and Patricia Ruger, Virgil and Marie Scott, and Descomp, Inc. subscribed to purchase shares in Wilmington House. This limited partnership was organized under the laws of Maryland for the purpose of acquiring and renting a garden apartment complex in Wilmington, Delaware. Plaintiffs made cash down payments and, as security for subsequent installments, obtained irrevocable letters of credit from defendant, Equitable Trust Company of Baltimore, Maryland. A fire occurred a month after the partnership acquired the property, and Wilmington House suffered disastrous losses.

In November 1978, the Rugers, the Scotts, James Stritzinger, and Data Controls North, Inc. subscribed to shares in another limited partnership, Eagle Associates. This organization was formed as a resyndication of a West Virginia coal mining business. Before investing in this venture, plaintiffs met with Equitable officials who reported favorably on the mine's prospects. Only Stritzinger obtained financing through Equitable for his Eagle Associates investment; the others were unable to do so.

Like Wilmington House, the Eagle venture proved to be unprofitable. Later, plaintiffs learned that Equitable had extended substantial loans to the mining business' predecessor, had been engaged in litigation with the predecessor's limited partner, and had agreed to the company's restructuring as a means to retire outstanding debts to the bank.

Debilitatingly high partnership losses, along with indications of misrepresentations and kickbacks, led plaintiffs to suspect that they had been defrauded by Equitable employees working in collusion with Lee P. Der, the promoter of both investments. Suits were filed against Equitable in April 1982 in the United States District Court for the District of Delaware asserting claims under the Securities Act of 1933, 15 U.S.C. §§ 77*l*, 77*o*, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78t, regulations of the Securities Exchange Commission, primarily Rule 10b-5, 18 C.F.R. § 240.10b-5, the federal RICO statute, 18 U.S.C. §§ 1961-68, as well as counts under state law. Equitable counterclaimed for the amounts still owed by plaintiffs on their obligations to the bank.

As the litigation proceeded, a number of the counts were resolved and have not been included in this appeal. Plaintiffs have challenged, however, the district court's applications of the statute of limitations to bar their

claims under section 10(b) of the Securities Exchange Act and SEC Rule 10b-5.

Because the Exchange Act counts are not governed by a statutory limitations provision, the district judge, complying with this court's precedent, searched for the state law cause of action most analogous to the plaintiffs' claims. For the plaintiffs who were Delaware residents, the court ruled that the Delaware general fraud statute was most analogous to the plaintiffs' claims and appropriated that statute's three-year time limitation.[1] *Hill I*, 562 F. Supp. at 1337-39 (applying Del Code Ann. tit. 10, § 8106) (1975).

For the other plaintiffs, who were not Delaware residents, the court decided that the Maryland Blue Sky law applied, providing for a maximum period of three years after sale or one year after discovery of the fraud, whichever came sooner. *Id.* at 1333-36 (applying Md. Corp. & Ass'ns Code Ann. § 11-703(f)). Because more than three years had elapsed since plaintiffs subscribed to both

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[1] The court referred to the Delaware borrowing statute which provides:

> "Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."

Del.Code Ann. tit. § 8121 (1975). This statute does not permit the borrowing of another jurisdiction's limitations period for Delaware residents. Thus, the court held that Delaware residents James T. Hill and Descomp, Inc. were entitled to the state's general fraud three-year limitations statute. *Hill v. Equitable Trust Co.*, 562 F.Supp. 1324, 1337-39 (D.Del. 1983). The court also ruled that the three-year Delaware general fraud statute had been equitably tolled; for that reason, the claims of the Delaware residents were timely. *Hill v. Equitable Bank*, 655 F.Supp. 631, 644 (D.Del. 1987).

the Wilmington House and Eagle Associates transactions, the court held that the section 10(b) and Rule 10b-5 claims were barred as to all non-Delaware residents. *Hill V*, 655 F. Supp. at 653.

The remaining counts proceeded to a jury trial. The jurors' responses to a comprehensive set of special interrogatories included a finding that plaintiffs had not exercised due diligence in investigating their claims. Based on that answer and others, the court entered judgment for defendant on the plaintiffs' outstanding claims. At the conclusion of a subsequent bench trial on the bank's counterclaim, judgment was entered in Equitable's favor.

Plaintiffs appeal the district court's selection of the proper statute of limitations to govern the section 10(b) and Rule 10b-5 claims, the entry of summary judgment on a Wilmington House count, and various evidentiary rulings at trial. We will discuss these issues in turn.

I.

THE STATUTE OF LIMITATIONS

The principal argument on appeal focuses on the applicable statute of limitations for the non-Delaware Eagle investors' section 10(b) and Rule 10b-5 claims. Plaintiffs argue that the district court erred in applying the Maryland Blue Sky statute of limitations in place of the Delaware general fraud law, or at least in rejecting their request for an equitable tolling of the Maryland statute.

A.

In ascertaining the proper limitations period for the non-Delaware investors, the district court preliminarily consulted the borrowing statute of Delaware, the forum state. *Hill I*, 562 F. Supp. at 1333. As that statute applies to nonDelaware residents, the jurisdiction where the cause of action arose supplies the rule of decision on the statute of limitations. Del. Code Ann. tit. 10, § 8121

(1975). Because the bank's alleged improper activity occurred in Maryland, the court concluded that the law of the state governed.

Maryland law offered two alternatives: its general fraud statute or its Blue Sky law. Not long before the present litigation began, the Court of Appeals for the Fourth Circuit reiterated its earlier holding that the statute of limitations found in the state's Blue Sky laws would apply to section 10(b) and Rule 10b-5 claims brought in the United States District Court in Maryland. *See O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981). Acknowledging that the purpose of the Delaware borrowing statute was to prevent forum shopping, *see Pack v. Beech Aircraft Corp.*, 50 Del. 413, 132 A.2d 54, 57 (1957), the district court here followed the rationale of *O'Hara* and adopted the three years from sale/one year from discovery limitations period of the Maryland Blue Sky law.

B.

Although the Exchange Act does not provide for a private cause of action under section 10(b), one has been judicially implied. Not surprisingly, the Act itself contains no limitations period governing such a lawsuit. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29, 96 S.Ct. 1375, 1389 n.29, 47 L.Ed.2d 668 (1976). Nor has the Supreme Court yet determined the appropriate limitations time.

When the district court made its ruling here, this court's decisional law required application of the most analogous state limitations statute comporting with the policy behind section 10(b) and Rule 10b-5. *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980); *Robert v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979). Our precedents held that, depending on the circumstances of the dispute, we would refer to either a

state's Blue Sky laws or its general fraud statute to determine the applicable statute of limitations.

After argument before the panel in this case, the entire court convened in banc in another appeal to again consider the proper limitations period for section 10(b) and Rule 10b-5 claims. In a comprehensive opinion written by Judge Aldisert, the court abandoned its previous precedents adopting analogous state statutes of repose. Instead, we found the most appropriate limitations statute for these cases in related provisions of the federal Securities Exchange Act. *In Re: Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir. 1988) (in banc). Accordingly, we adopted for section 10(b) and Rule 10b-5 cases a statute of limitations of "one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation." *Id.* at 1550.

Although the judges of this court were unanimous that this federal statute of limitations should apply in section 10(b) and Rule 10b-5 cases, the majority specifically declined to decide whether its holding would be retroactive. Three dissenting judges maintained that, in conformity with the standards the Supreme Court set in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the *Data Access* ruling should be made prospective only. This question, deferred in *Data Access*, must now be addressed.

C.

We begin with the general rule that a controversy is to be decided on the law as it exists at the time the appellate court considers the case, although that law may differ from the one in force at the time the trial court decided the matter or at the time the events sparking the litigation occurred. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16, 101 S.Ct. 2870, 2879 n.16, 29 L.Ed.2d 784 (1981); *United States v. The Schooner*

Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). In effect, a court's decision by its nature acts retroactively, deciding the legality of actions which took place in the past. The jurisprudential theory underlying this phenomenon was explained by Blackstone, who wrote that the duty of a court is not to "pronounce a new law, but to maintain and expound the old one." 1 W. Blackstone, *Commentaries* *69.

Austinian philosophy, however, espouses a less metaphysical perspective of a court's decision making, contending that judges do, in fact, make law. Reflecting that view, the Supreme Court in *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), rejected a constitutional challenge to a state court decision which applied a new rule of law prospectively only. A few years later, in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 318, 84 L.Ed. 329 (1940), Chief Justice Hughes commented that the existence of a law before a determination of unconstitutionality is "an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."

Two decades later, these conceptual observations were translated into a legal formulation. In *Linkletter v. Walter*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed. 2d 601 (1965), the Court explained that whether a ruling will apply only prospectively depends on a weighing of "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

Although the strict Blackstonian approach is not an irrefutably correct statement of the proper judicial role, it remains true that the realm of prospective lawmaking is a traditionally legislative function and retroactive legal

interpretation is historically a judicial task. As Professor Mishkin has written:

> " 'the declaratory theory' expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. . . . [T]he recognition of a need affirmatively to justify retroactivity, and certainly the announcement that 'the rule adopted today is to be effective only from this date forward' are inconsistent with the basic symbolic view of the judicial process."

Mishkin, *The Supreme Court 1964 Term, Forward: The High Court, The Great Writ, and The Due Process of Time and Law*, 79 Harv. L. Rev. 56, 62, 65 (1965), *reprinted in* R. Aldisert, *The Judicial Process* 905 (1976).

These conflicting jurisprudential theories may present a formidable intellectual armament for academic jousting over whether a given decision should be applied retroactively or only prospectively. Our task here is made somewhat less debatable by the Supreme Court's discussion in *Chevron Oil Co. v. Huson*. In that case, the Court was called upon to decide the applicability of a statute of limitations ruling that had been handed down after the plaintiff's suit had begun. Under the law in force on the date of filing, the plaintiff's complaint had been timely. If applied prospectively only, the later decision shortening the limitations period would not effect on the plaintiff's case; if applied retroactively, the ruling would have barred the suit as untimely.

Confronting this choice in *Chevron*, the Court set out three qualifications for making a decision prospective only:

(1) The holding must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) The merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will further or retard the rule's operation;

(3) Retrospective application must create the risk of producing substantially inequitable results.

Chevron Oil Co., 404 U.S. at 106-07, 92 S.Ct. at 355.

We have applied these criteria in a number of cases where the statute of limitations was at issue. In *Fitzgerald v. Larsen*, 769 F.2d 160 (3d Cir. 1985), and *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.), *cert. denied*, 474 U.S. 950, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985), we refused to treat as prospective only the ruling of the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), which applied uniform personal injury limitations in section 1983 civil rights cases. In *Smith* and *Fitzgerald*, we concluded that, because a definitive ruling by this court on the appropriate limitations period was lacking at time the complaints were filed, those plaintiffs could not justify their delay in bringing suit.

Prior precedent, we wrote, must be "sufficiently clear that a plaintiff could have reasonably relied upon it in delaying suit, a criteria that was not met where the law was erratic and inconsistent." *Fitzgerald*, 769 F.2d at 103. *Cf. Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3d Cir. 1986) (clear precedent gave plaintiff right to rely on statute of limitations established by case law prior to time complaint was filed), *aff'd*, —— U.S. ——, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). *Accord Brown v. Foley*, 810 F.2d 55 (3d Cir. 1987); *Pratt v. Thorn-*

burgh, 807 F.2d 355 (3d Cir. 1986), *cert. denied*, —— U.S. ——, 108 S.Ct. 125, 98 L.Ed.2d 83 (1987).

In the present litigation, at least two of the three *Chevron* factors counsel in favor of the general presumption of retroactivity and against the uncommon exception of prospectivity. In their answers to the special interrogatories, the jury found that plaintiffs were aware as early as June 1979 of the possibility of claims in connection with the Eagle Associate investments they had purchased in November 1978. Yet, the suit against Equitable was not filed until April 1982. Two dates, therefore, may be pertinent: June 1979 and April 1982. We must examine the state of the law at those times to determine whether precedent existed on which plaintiffs reasonably could have relied.

On November 14, 1979 we filed our opinion in *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir. 1979), a case of first impression in our court addressing the proper limitations period for section 10(b) and Rule 10b-5 cases. That decision came five months after the date the jury found plaintiffs should have discovered the potential for fraud claims. Each of the three panel members in *Roberts* wrote a thoughtful opinion. The majority, although differing on rationale, applied the state general fraud statute. *Id.* at 456. The dissenting opinion, drawing a comparison to the federal securities acts, would have applied the shorter period incorporated in the state's Blue Sky law. *Id.* at 463 (Seitz, J., dissenting).

The next year, we decided a similar case, *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980) (filed Dec. 31, 1980), with the panel again split. The two judges who had formed the majority in *Roberts* opted for the state general fraud statute; the dissent selected the state Blue Sky law as a closer analogy.

In sum, before we filed our first opinion on this question in November 1979, plaintiffs could not reasonably

have relied on any ruling of this court setting out the appropriate section 10(b) and Rule 10b-5 statute of limitations. By the end of 1980, four judges from this court had considered the issue; two would have applied the state general fraud laws and two would have used the Blue Sky statutes. Consequently, the law in the circuit on this point could fairly be described as uncertain.

In 1981, the present plaintiffs brought suit against the promoter of the Wilmington House and Eagle Associates investments. *See Hill v. Der*, 521 F. Supp. 1370 (D. Del. 1981). There, Chief Judge Latchum confronted a statute of limitations defense to the section 10(b) and Rule 10b-5 claims. After reviewing the opinions in *Roberts* and *Biggans*, he wrote: "Because of the narrow ground upon which both *Roberts* and *Biggans* were decided and the lack of a firm consensus as to the proper guidelines to be applied, it is difficult to predict what effect these opinions hold for the circumstances posed by the present complaint." *Id.* at 1382-83. Ultimately, Judge Latchum found those two cases distinguishable and used the Delaware Blue Sky law to fix the proper Rule 10b-5 limitations period.

The *Der* opinion was filed on September 17, 1981. Its painstaking review of our limitations cases placed these very plaintiffs on notice that, at least as of their filing date, the law in the circuit on this issue was in ferment. Although the majority opinions in *Biggans* and *Roberts* were precedential, the factual situations in each case left considerable room for variation as *Der* demonstrated. Clear holdings on which plaintiffs could reasonably rely, as in *Al-Khazraji* and its progeny, were absent when plaintiffs decided to begin this suit in 1982.

If we look to the earlier date—June 1979—when plaintiffs should have learned of facts pointing toward a claim for fraud, our precedent was even less settled. Only *Roberts* had been decided by that time, and it provided no

controlling authority on which plaintiffs reasonably could have relied in view of the factual distinctions here.

Although the in banc holding in *Data Access* shifted our focus from the comparable state statutes to analogous federal law, the policies inherent in the federal limitations period were alluded to in the dissenting opinions in both *Roberts* and *Biggans*. *Data Access* represented a significant development in section 10(b) limitations, but the resolution in that case was not completely "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.*, 404 U.S. at 106, 92 S.Ct. at 355. Neither are we convinced that *Data Access* signaled an abrupt change in clearly established law, as our survey of *Roberts* and *Biggans* reveals. Thus, we cannot say that the first of the *Chevron* criteria is satisfied here.

We may assume on these facts, as we did in *Al-Khazraji*, 784 F.2d at 513, and *Fitzgerald*, 769 F.2d at 164, that resolution of the second *Chevron* criteria—whether retrospective operation would further or retard the rule's function—is neutral.

The third criteria, whether retroactivity would produce substantial inequitable results, proves to be the plaintiffs' weakest position. We concluded in *Data Access* that the appropriate period of limitations for section 10(b) and Rule 10b-5 cases was one year after discovery, with a maximum outside limit of three years from date of purchase. *Data Access*, 843 F.2d at 1550. This limitations period is identical to the statutory provision adopted by the district court under section 11-703(f) of the Maryland Corporation and Associations Article. *See Hill I*, 562 F. Supp. at 1336. Thus, plaintiffs fare the same whether our new *Data Access* holding or the Maryland statute applies.

Moreover, in light of the precedent existing at the time of its ruling, the district court did not err in reasoning

that Delaware's borrowing statute mandated application in this lawsuit of the Fourth Circuit decision. Before the district judge could decide which state statute was most analogous to the federal cause of action, it was necessary to make the threshold determination of which state's law should be reviewed. The judge properly resolved this preliminary issue by referring to the forum state's borrowing statute. *See Cope v. Anderson*, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed 1602 (1947). That reference led the search to Maryland, a development that should have come as no surprise to plaintiffs, just as the choice of that state's Blue Sky law should not have been unexpected.

The Court of Appeals for the Fourth Circuit had applied this same Maryland limitations period in 1976 to an action brought under section 10(b) and Rule 10b-5 of the federal securities law.[2] *See Fox v. Kane-Miller Corp.*, 542 F.2d 915, 917 (4th Cir. 1976). Confronted with that published opinion, plaintiffs cannot credibly assert inequitable treatment. They were obviously on notice of the time period adopted by the Court of Appeals for the Fourth Circuit years before the cause of action in this case had accrued.

Although in *Data Access* we traveled by a different road than the district court did here, application of our in banc holding leads to the same destination. Under either approach, the effect on plaintiffs is the same.

This case illustrates some of the dilemmas eliminated by *Data Access*. Because the period of repose is now to be found in the federal securities statute, there no longer is any need to consult local borrowing statutes before beginning the color-matching our earlier decisions required. The facts here also demonstrate the inequity

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[2] In *O'Hara*, the Court of Appeals distinguished *Roberts* because unlike our case, Maryland's Blue Sky law did provide protection for sellers. *O'Hara*, 625 F.2d at 18 n. 3.

that can result when differing limitation periods are applied depending on the plaintiff's state of residence. Here, all plaintiffs asserted identical claims under the same federal act, yet the non-Delaware plaintiffs were barred from recovery by a period of limitations shorter than the one binding the Delaware residents, who were favored by their own state's borrowing statute.

Plaintiffs have failed to convince us that application of *Data Access* to this case would be contrary to *Chevron's* limited non-retrospectivity exception. Accordingly, we will affirm the judgments of the district court on the statute of limitations issue.

II.

SUMMARY JUDGMENT

Although the statute of limitations ruling resolves most of the claims raised by plaintiffs on this appeal, some common law contentions remain. Those plaintiffs who subscribed to the Wilmington House investment complain that the bank violated its duty to properly supervise its employees. Plaintiffs argue that a bank vice president, Stephen Meszaros, was friendly with Lee Der, the promoter, and had received various gifts in return for his cooperation in the scheme.

The district court granted the bank's motion for summary judgment on this claim. The court found no evidence of any causal relationship between the alleged dereliction by the bank and the plaintiffs' decision to invest in Wilmington House. *Hill IV*, 655 F. Supp., at 645-46.

Before investing in Wilmington House, plaintiffs had no contract with the bank, and its advice was neither solicited nor volunteered. The only role of the bank in the transaction was its issuance of letters of credit guaranteeing future installment payments. The financing ar-

rangements were not made by plaintiffs, but rather were arranged with the bank through Der. The undertaking, in effect, was equivalent to a loan. As the district court concluded: "Plaintiffs have not demonstrated that a bank is under a duty to insure that an investment is sound before loaning money to a customer on that investment." *Id.* at 646.

Plaintiffs rely on *Jacques v. First Nat'l Bank*, 307 Md. 527, 515 A.2d 756 (1986), a case which is readily distinguishable. The Maryland Court of Appeals held in *Jacques* that a contractual relationship existed between a bank and its customer. The court found it decisive that the bank, in exchange for a loan application fee, had agreed to lock the customer into a particular interest rate and to fairly process his loan application. Those commitments, reasoned the court, created a duty on the part of the bank to exercise reasonable care in processing the loan. No such relationship existed here.

We will affirm the district court's entry of summary judgment on the Wilmington House investment claims.

III.

THE EVIDENTIARY RULINGS

The Eagle Associates investors argue that the trial court improperly excluded evidence which, they assert, tended to show that the bank participated in the fraud either directly by selling partnership interests or indirectly by engaging in a conspiracy with the promoter. We review the district court's evidentiary rulings under an abuse of discretion standard. *Salas v. Wang*, 846 F.2d 897 (3d Cir. 1988).

Plaintiffs first allege that the bank's vice president Meszaros and his successor, R. Kenneth Rous, had close ties with Der. Until he left the bank in September 1978 to join Der's business, Meszaros was personally responsible for Der's account with the bank. Additionally, Der

testified that he and Meszaros had taken trips together. But the trial judge refused to admit further evidence that Der had paid for the trips, that he had consented to judgments in excess of $1 million dollars being entered against him by the Bank in November 1982, and that the bank had forced him into bankruptcy in March 1983.

Much of this evidence was irrelevant, relating to events which occurred years after plaintiffs made their investments. To a large extent, the evidence was also cumulative. Equitable's president testified that Meszaros and Der had been friends since their school days, that they had vacationed together for three or four years, and that Meszaros had been terminated because he had become too close to some of his customers. One of the plaintiffs testified that "the bank had Mr. Der in bankruptcy." Even if it were established that the plaintiffs' additional evidence had been improperly excluded, we believe that the district court's refusal to admit the evidence would have been harmless error in light of the other testimony of record establishing much the same factual scenario.

Plaintiffs next contend that the district court erred in refusing to admit internal publications describing the bank's personnel procedures. Plaintiffs offered these exhibits to prove the bank's negligent supervision of its employees. The court refused to admit the documents on the ground that portions of the material was unduly prejudicial. We find that this ruling was within the trial court's discretion.

Finally, plaintiffs argue that the district court improperly frustrated their efforts to prove to the jury that they had exercised due diligence in investigating their claims. In this connection, plaintiffs offered letters they had written in 1981 to both Equitable and state banking regulators. Viewing many of the letters as self-serving, the district court admitted only a portion of

this correspondence—in a redacted form—while excluding numerous similar documents. These letters were, in large measure, cumulative of other evidence. The ruling was not an abuse of discretion.

We will affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
D. DELAWARE

Civ. A. No. 82-220 CMW.

JOHN T. HILL, *et al.*,
Plaintiffs,

v.

EQUITABLE BANK, NATIONAL ASSOCIATION,
Defendant.

Jan. 9, 1987

Amendment to Opinion March 2, 1987

OPINION

CALEB M. WRIGHT, Senior District Judge.

INTRODUCTION

These consolidated cases arise out of an alleged scheme to defraud plaintiffs in the purchase of interests in two limited partnerships, Wilmington House Associates ("Wilmington House"), and Eagle Associates ("Eagle").[1] Defendant Equitable Bank issued letters of credit for some of plaintiffs' investments, was involved in a meet-

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[1] The cases consolidated with *Hill v. Equitable Bank, N.A.* are *Equitable Trust v. Scott*, C.A. 84-589; *Equitable Trust v. Hill*, C.A. 84-590; *Equitable Trust v. Ruger*, C.A. 84-591; *Equitable Trust v. Descomp, Inc.*, C.A. 84-592; and *Equitable Trust v. Stritzinger*, C.A. 85-216.

ing promoting the investment, and had significant financial dealings with the partnerships' organizer. This Court has already ruled on two motions to dismiss the entire complaint [2] and one motion to dismiss the Racketeer Influenced and Corrupt Organization Act ("RICO") counts of the Second Amended Complaint.[3] Now pending before the Court is defendant's Motion for Summary Judgment on all twenty-three counts of the plaintiffs' Second Amended Complaint. For the reasons stated in the following opinion, this motion will be granted in part and denied in part.

FACTS

Plaintiffs John T. Hill, Thomas and Patricia Ruger, Virgil and Marie Scott, and Descomp, Inc., a corporation controlled and managed by Messers. Ruger and Scott, invested in the Wilmington House Associates ("Wilmington House") limited partnership on November 11, 1977. Lee P. Der, through Lee P. Der, Inc., served as the general partner of Wilmington House. The limited partnership was formed for the purpose of acquiring and operating an apartment complex.

Defendant Equitable's role in the Wilmington House investment was to finance the plaintiffs' purchase of limited partnership interests. Under the subscription agreement for Wilmington House, plaintiffs were required either to make full payment at the outset or to make a down payment on November 11, 1977 and to make installment payments on May 1, 1978, February 1, 1979, February 1, 1980 and February 1, 1981.[4] If an

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[2] 562 F.Supp. 1324 (D.Del. 1983) (*"Hill I"*), and 599 F.Supp. 1062 (D.Del. 1984) (*"Hill II"*).

[3] 642 F.Supp. 1013 (D.Del. 1986) (*"Hill III"*). The RICO conspiracy count based on the Wilmington House investment was dismissed in *Hill III*.

[4] The parties submitted extensive factual documents in support of their memoranda in support of and in opposition to the summary

investor chose to pay in installments, he was required to secure the payments by irrevocable, negotiable letters of credit issued by a commercial bank acceptable to the general partners. Opening, Ex. A, p. 22. If an investor failed to make the required payment, the bank would make the payment pursuant to the letters of credit. The defaulting investor would then be personally liable to the bank for the missed payment. *Id.* at 23. Equitable issued letters of credit to the plaintiffs to secure their purchases of Wilmington House limited partnership interests. Plaintiffs, however, had no direct contact with any Equitable official or employee; instead, plaintiffs applied for the letters of credit through Der.

Approximately one year later, in November of 1978, plaintiffs Thomas Ruger, Virgil and Marie Scott, James Stritzinger, and Data Controls North, Inc., a corporation controlled by Ruger and Scott, invested in Eagle Associates ("Eagle"). Eagle was formed as the resyndication of Alma Coal Properties Ltd. ("Alma") and was to be engaged in the coal mining business in West Virginia. Although the businesses of Eagle and Wilmington House were quite different, the method of payment for investors was similar. The Eagle investors also had the option to pay in installments secured by an irrevocable letter of

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judgment motion. These submissions include excerpts from deposition testimony, interrogatory answers, documents produced in discovery, and the documents relevant to the formation of each limited partnership. Citation to these submissions will be in the following manner: Documents submitted in support of defendant's memorandum in support of its motion for summary judgment will be cited as Opening, Ex. ——; documents submitted in support of plaintiffs' answering memorandum will be cited as Answering, Ex. ——; and those submitted in support of defendant's reply memorandum will be cited as Reply, Ex. ——. For example, the Wilmington House Subscription Agreement which sets out the payment schedule is Exhibit B of the factual submissions to defendant's opening memorandum and will be cited as Opening, Ex. B. The memoranda themselves will be cited as Opening, Answering and Reply.

credit. Opening, Ex. C, p. 6. Equitable agreed to finance Stritzinger's purchase of an interest in Eagle; however, the bank declined to finance the purchase of the remaining plaintiffs. Consequently, the remaining plaintiffs paid the balance in January, 1979 on the purchase price for their Eagle interests but characterized these payments as loans to Eagle as security for their future installments payments. In any event, the plaintiffs were bound to make the installment payments. Whether these future payments were fully "secured" by the "loans" or by an irrevocable letter of credit, the Eagle partnership could be sure that the money due it would be received.

Problems with these investments led to this suit. Troubles for Wilmington House began with a fire in the boiler room at Lancaster Court on December 9, 1977.[5] The venture suffered financial difficulty, and, in January 1979, Lancaster Court Associates filed for bankruptcy. Plaintiffs first learned of this bankruptcy not from Der or the other principals in Wilmington House but from a third party not involved in the investment. Reply, Ex. 5, pp. 520-521. In April of 1979, plaintiffs received their K-1 tax forms for Wilmington House and discovered that the losses for 1978 were twice what Der and the other organizers had indicated they would be.

At about the same time that the Wilmington House investment was falling apart, the Eagle partnership was suffering problems of its own. The K-1 form plaintiffs received for Eagle also indicated losses greater than had been represented. In May and June of 1979, the Eagle partnership shifted from owning and operating its own mine to contract mining. Plaintiffs were told that this change was necessitated by new Environmental Protec-

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[5] This fire occurred soon after Lancaster Court Associates purchased the apartment complex. Wilmington House was created to be the sole limited partner in Lancaster Court Associates, and any problems Lancaster Court Associates faced directly affected the limited partners in Wilmington House. *See* Opening at 1-2.

tion Agency regulations which rendered the coal in the mine Eagle owned unmarketable.

In 1980, plaintiffs sued Der and the other principal organizers involved in the two partnerships. *Hill v. Der*, C.A. 80-146.[6] Plaintiffs did not sue Equitable for its involvement in these investments until April 1982. Filing of the suit against Equitable resulted from a conversation between Mr. Mason, one of the principals along with Der, and Thomas Ruger, in which Mason told Ruger that Stephen Meszaros, a Vice President of Equitable, had received kickbacks in exchange for arranging the financing for Wilmington House. Prior to this telephone conversation, plaintiffs began to inquire about Equitable's role in the Eagle and Wilmington House investments. These inquiries included letters to the bank and letters to both state and federal bank regulating bodies. Answering, Ex. 31. None of these inquires proved fruitful for plaintiffs. As will be discussed more fully below, plaintiffs contend that they could not have discovered Equitable's involvement in the alleged federal securities violation and common law fraud prior to the conversations between Mason and Ruger.

The substance of plaintiffs' claims revolves around a meeting held on November 6, 1978. Present at the meeting were Der, Meszaros, plaintiffs Ruger and Scott, and R. Kenneth Rous, a vice-president of Equitable. According to Ruger and Scott, Rous misrepresented to them the soundness of the Eagle investment, the extent of Equitable's involvement with Eagle organizers, and the honesty of Der.[7]

In *Hill II*, the court held that the bank was potentially liable for failure to disclose facts relating to the

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[6] Even though *Hill v. Der* was filed prior to the instant case, *Hill v. Der* has been stayed pending resolution of this case.

[7] The extent of Rous' alleged misrepresentations is set out in Ruger's answers to interogatories. Opening Ex. E, pp. 4-5. This answer is cited in full, *infra*.

misrepresentations Rous made. The facts Rous failed to disclose that related to his representations included those concerning the creation of the Eagle partnership. Eagle represented the resyndication of a prior limited partnership, Alma Properties, that was also a Der syndication. Equitable had issued an irrevocable letter of credit to Richard Ward, the only limited partner in Alama, to finance his investment in Alma. Equitable also had loans outstanding to the Alma partnership and its operating subsidiary, Manila Mining. Problems arose in the Alma partnership, and Ward refused to make the installment payments that were coming due. Ward also went to court to enjoin Equitable from paying Alma on the letter of credit. *See* Answering, Ex. 37.

Ward's refusal to pay placed Alma in a precarious financial position. Ward's refusal also meant that Alma would not be able to repay its Equitable loans. Representatives of Alma, including Der, and Rous, as a representative of Equitable, held a meeting on August 18, 1978, to find a solution to these problems. The solution arrived at was a resyndication of Alma into another limited partnership, Eagle. Investments into this new limited partnership would in part be used to pay off the debts Alma owed to Equitable. In addition to this resyndication, the lawsuit filed by Ward against the bank and Alma was settled. When Rous represented to plaintiffs that the Eagle investment was sound, he did not inform them of the amount of money Der and Alma owed the bank or of the settlement of the Ward lawsuit.

Plaintiffs also learned that Mr. Meszaros had been asked to leave Equitable because he was too closely involved with Der. Answering, Exs. 33-34. That involvement included trips that Der and Meszaros took together. Meszaros was the Equitable officer who approved the Wilmington House loans. At the time of the November 6th meeting, Meszaros was working with Der and not Equita-

ble, but he may still have been receiving compensation from Equitable. At the time of the November 6th meeting, plaintiffs were not informed of any potential impropriety in Meszaros' relationship with Der.

SUMMARY JUDGMENT

This Court has already issued three opinions on whether or not plaintiffs' claims are viable as pled. Now, after four years, the Court has extensive factual submissions on which it can determine what counts should be dismissed and what counts should go before a jury at trial. The moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue of material fact exists if the Court, after resolving all factual disputes having a colorable foundation in the evidentiary record in favor of the non-moving party, finds that the moving party still is entitled to judgment as a matter of law. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). Although disputes are resolved in favor of the non-moving party, the non-moving party must present to the Court facts which refute the version of facts presented by the moving party.

Defendant has moved for summary judgment on two basic grounds. First, defendant argues that plaintiffs' claims are all barred by the statutes of limitations. Second, even if plaintiffs' claims are not time barred, defendant argues that it is entitled to summary judgment on the merits for all twenty-three counts. Plaintiffs' twenty-three count complaint can be divided into three general areas: federal securities law claims under the anti-fraud provisions of the Securities Act of 1933 and

the Securities Exchange Act of 1934; common law claims for fraud; negligent misrepresentation and negligence; and civil racketeering claims under RICO.[8]

STATUTE OF LIMITATIONS

In *Hill I* and *Hill II*, this Court ruled upon the appropriate limitations period to be applied to plaintiffs' federal securities claims. *Hill I*, 562 F.Supp. at 1336-1339; *Hill II*, 599 F.Supp. at 1072. The limitations period applicable to plaintiffs' claim under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder are the applicable state statutes of limitations. For plaintiffs Hill, Stritzinger and Descomp, Inc. the appropriate statute of limitations is the three year limitations period set forth in 10 *Del.C.* § 8106. The one year Maryland limitations period applies for the other plaintiffs' claims. Md.Corps. & Assn.Code Ann. § 11-703(f). Although state law determines the applicable statute of limitations, federal law determines when the limitations period begins to run. *Hill v. Der*, 521 F.Supp. 1370, 1387 (D.Del.1981). If the statute of limitations began to run when plaintiffs signed the partnership agreements, then all their claims would be time barred. Plaintiffs, however, have raised two reasons for tolling the running of the statute of limitations: the investment decision doctrine and equitable tolling.

A. *Investment Decision Doctrine*

A 10b-5 cause of action accrues on the date that the purchase or sale of securities occurred. *Hill II*, 599 F. Supp. at 1072. This generally means that the cause of action accrues on the date that a party enters into a binding agreement to buy or sell securities. *See Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890-91

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[8] Counts 1 through 15, 21 and 22 refer to the Eagle investment. Counts 16 through 20 and 23 refer to Wilmington House.

(2d Cir.1972). If, however, a party enters into an agreement to purchase securities into the future but the party possesses the power to terminate the agreement, the party may be viewed as making a new investment decision on each occasion that the party invests additional money. Each such investment decision may be viewed as a new purchase or sale; therefore, a new cause of action accrues at the payment of each installment. *See Goodman v. Epstein*, 582 F.2d 388, 409-14 (7th Cir.1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). Because plaintiffs paid for their limited partnership shares in installments, the question arises as to whether or not the investment decision doctrine of *Goodman* should apply.

On close examination of the documents relevant to the formation of the two partnerships,[9] the Court finds that the investment decision doctrine does not apply. In Wilmington House, the Rugers, the Scotts, Hill and Descomp all purchased limited partnership interests through the execution of subscription agreements on November 11, 1977. The investors chose to make installment payments over time instead of paying the full price of a partnership interest. These payments, however, were not discretionary. Definite amounts of money were due on definite dates into the future. Opening, Ex. B, p. 5. Moreover, each of these payments had to be secured by an irrevocable letter of credit from a commercial bank. Thus, if plaintiff defaulted on a payment, the partnership could turn to the bank for payment, and the limited partner "may be personally liable to the Bank." Opening, Ex. A, pp. 22-23. The installment payments were secured by irrevocable letters of credits issued by Equitable. The Eagle agreement also required investors who chose to pay in installments to make definite payments on definite dates in the future. James Stritzinger financed his Eagle investment with an Equitable letter of credit. The other

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[9] Opening, Ex. A, B, C, G, and L.

Eagle investors paid the remainder of their investment in January of 1979 in the form of loans to the partnership which were subsequently offset against the installment payments as the installments became due. *Hill II*, 599 F.Supp. at 1068.[10]

The factual situation in this case is radically different from that in *Goodman v. Epstein*, *supra*. In *Goodman*, the future payments requested from the limited partnership's investors were made on uncertain dates and for uncertain amounts, based upon requests from the general partner. The *Goodman* court held that this allowed the investors to make a discretionary determination of whether or not to continue to invest; thus, each further investment constituted a purchase or sale of securities. *Goodman*, 582 F.2d at 413. It therefore follows that any fraud prior to the new investment could be viewed as a fraud in connection with a purchase or sale of securities. *Id.* By contrast, as described above, the Wilmington House and Eagle investors were committed to making all the future payments. Nothing they were told or not told could affect their decision to make the installment payments for the plain fact that the plaintiffs had no decision to make. When each installment came due, plaintiffs were not deciding to invest again; instead, they were merely paying for an already existing investment.

Just as in *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2d Cir.1972), the plaintiffs in this case entered

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[10] Because the Court finds that the investment decision doctrine does not apply to any of the plaintiffs' investment, any distinction between the investments secured through Equitable letters of credit and those secured by direct loans from plaintiffs to the partnership is unimportant. All the installments on both investments were paid. For those installment payments financed through loans from plaintiffs to the partnership, the payments were little more than paper transactions in which monies due the plaintiffs under the loans were offset against monies the plaintiffs owed the partnership.

into a binding commitment to purchase the limited partnership interest. The purchase or sale occurs on the date that the parties entered into that "binding commitment." *Id.* at 890-891. The facts in the instant case are almost identical to those in *Stewart v. Germany*, 631 F.Supp. 236 (S.D.Miss.1986). The *Stewart* court relied on the fact that plaintiff was obligated to meet cash calls in order to protect her partnership interests; that plaintiff remained liable in the event of non-payment; and that payments did not create a new interest. *See Ingenito v. Bermec Corp.*, 376 F.Supp. 1154 (S.D.N.Y. 1974) (distinguishing between payments to protect an already existing interest and payments that created a new interest). In both Eagle and Wilmington House, investors had to make payments in the future on definite dates to maintain their partnership interest. Failure to do so resulted in the forfeiture of the partnership interest; however, the investor remained liable for the payments due the partnerships.

Plaintiffs contend that the options available to them under the partnership agreements create the necessary discretion to apply the *Goodman* doctrine to the instant case. Under the Wilmington House Limited Partnership Agreement, the limited partners can terminate the partnership upon the "decision of the partners owning at least 66⅔% of the aggregate partnership interest of all partners." Answering, Ex. 3, p. 2. Similarly, the Eagle partnership could be terminated upon the vote of 80% of the partners. Answering, Ex. 4, p. 2. Plaintiffs argue that this power of termination gave them the power to terminate their obligations under the agreements; therefore, their failure to exercise this power meant that each installment constituted a new investment decision.

In *Hill II*, the Court accepted plaintiffs' argument that the powers in the agreement that the investment decision doctrine potentially applied. "Whether plaintiffs state a claim under the investment decision doctrine is therefore,

a factual issue that may not be determined by the Court on the present motion to dismiss." 599 F.Supp. at 1074. Now before the Court are sufficient, undisputed facts to hold that these options did not create an investment decision for the plaintiffs.

No single limited partner could pull out of his commitment. If all the other limited partners chose to continue the partnership, no single limited partner could make an independent investment decision to cease investing. Plaintiffs contend that, for Wilmington House, plaintiffs owned sufficient shares to terminate the partnership. This is only true for plaintiffs as a group; however, the fact remains for Wilmington House as well as Eagle that no individual limited partners could escape from the investment contracts.

A second reason that plaintiffs' options do not create decisions is that the options available to plaintiffs assume that they already owned the full partnership interest. The distinction made between two kinds of investments in *Ingenito v. Bermec*, 376 F.Supp. 1154 (S.D. N.Y.1974), is significant here. In *Ingenito*, the court distinguished between payments made on a maintenance contract and those made on a promissory note. The payments made on the maintenance contract increased the investor's equity by improving the quality of the investment while the payments of the promissory note did not increase their interests. 376 F.Supp. at 1184. Because of this distinction, the court held that each payment on the maintenance contract constitued an investment decision but that the promissory note payments were not separate investment decisions.

The payments at issue in the instant case are substantially identical to the payments made on the promissory note in *Ingenito*. The agreements plaintiffs signed when they entered the partnership gave the plaintiffs the full limited partnership interests. Their right to terminate

the partnership represented a right they had as full limited partners. These interests did not increase with each subsequent payment; indeed, plaintiffs' rights at the outset of the agreement were identical to their rights when plaintiffs made final payment. Because the ownership interest fully vested at the time of the agreement, the right to dissolution is in reality no different from a right to sell the shares. In *Hill II*, this Court held that the option to sell shares or rescind the contract of sale did not constitute options to which the investment decision doctrine applies. 599 F.Supp. at 1073, n. 11. After seeing the agreements involved in this case, the Court holds that the option to terminate the Eagle and Wilmington House partnerships were analogous to a sale of a recission and did not transform each installment payment into an investment decision.[11]

Finally, plaintiffs own testimony indicates that plaintiffs did not believe that they possessed any options. Ruger testified that he knew of no options to making his 1980 Wilmington House payment. Opening, Ex. H, pp. 236, 239. He also testified that he was not sure if the 1980 Eagle payment had been made, but he assumed that it had. Opening, Ex. I, p. 617. Scott's testimony followed similar lines. Opening, Ex. J, pp. 89, 90, 149, 150. In short, plaintiffs have offered no testimony to refute the

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[11] Plaintiffs contend that their statutory right to dissolve the partnership also creates an investment decision. Md.Corp. & Assn. Code Ann. § 10-801. This right, like the right to dissolution given in the agreement, implies a full ownership interest. Thus, the statutory right to dissolution does not create an investment decision. It is unclear from *Goodman* the extent to which that court relied on the partners' statutory right to dissolution. 582 F.2d at 413. In *Hill II*, this Court noted that it was not reading the investment decision doctrine as broadly as it had been read in *Goodman*, 599 F.Supp. at 1073, n. 11. The statutory right to dissolution is analogous to a common law right of recission because, in both cases, plaintiffs' right to terminate the purchase would be the same whether the full cost was paid up front or the cost was paid over time.

plain meaning of the agreements. The agreements unequivocally create binding obligations on the plaintiffs to make the future payments. There remains no issue of fact with respect to the investment decision question, and the Court holds as a matter of law that the investment decision doctrine is inapplicable to plaintiffs' investment in Eagle or Wilmington House.

B. Equitable Tolling

Because the investment decision doctrine does not apply, the securities causes of action accrued when plaintiffs bound themselves. The Wilmington House counts accrued in November of 1977, and the Eagle counts accrued in November and December of 1978.[12] If the investment decision doctrine were the only grounds to stop the running of the statutes of limitations, this Court could grant summary judgment to defendant on all counts. However, the doctrine of equitable tolling will allow the plaintiffs to survive the statute of limitations ground to the summary judgment motion for most of their claims.[13]

Even though the cause of action accrued on the dates that the agreements were signed, the federal doctrine of equitable tolling stops the running of the statute of limitations on a fraud cause of action if the plaintiff, "remains in ignorance of [the fraud] without any fault or lack of diligence on his part." *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). This doctrine was explained in *Hill II:*

> [O]nce a plaintiff becomes aware or should have been aware of sufficient "storm warnings" of fraud to place the plaintiff on "inquiry notice", the plaintiff must exercise reasonable diligence in investigat-

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[12] Stritzinger invested later than the other plaintiffs.

[13] As will be discussed *infra*, some of plaintiffs' counts are founded on securities laws with absolute limits regardless of equitable tolling. Those claims will be dismissed.

> ing the cause of action for fraud. *See e.g., Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690, 692-93 (8th Cir.1981); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir.1978). The statute of limitations begins to run once the plaintiff is aware of, or should have been aware of, enough facts pointing to fraud that the possibility of fraud is, or should have been, apparent. 559 F.Supp. at 1071-77 (footnote omitted).

Determining when the plaintiffs should have known about the fraud is a highly fact-based determination. In making this determination, the Court must answer two basic questions: (1) when did the plaintiffs know enough to excite further inquiry; and (2) once plaintiffs knew enough to excite inquiry, was the investigation plaintiff undertook to uncover the fraud reasonable? *See Sleeper v. Kidder Peabody & Co., Inc.*, 480 F.Supp. 1264 (D. Mass.1979), *aff'd.*, 627 F.2d 1088 (1st Cir.1980). Although there have been cases in which a court has granted summary judgment on the equitable tolling question, a court should be certain that it can rule, as a matter of law, that, given the undisputed facts, plaintiffs should have discovered the fraud sooner. A determination that investigation by a plaintiff was unreasonable as a matter of law requires a clear case of failure to investigate, because "[t]he question of what a reasonably prudent investor should have known is particularly suited to a jury determination." *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.1984), *cert. denied*, 469 U.S. 932, 105 S.Ct. 329, 83 L.Ed.2d 265 (1984). *See also, Johns Hopkins University v. Hutton*, 422 F.2d 1124, 1131 (4th Cir.1970), *cert. denied*, 416 U.S. 916, 94 S.Ct. 1622, 40 L.Ed.2d 118 (1974) ("It is sufficient for us to say that when, as here, a jury has been demanded and the facts give rise to conflicting inferences on the issue of reasonable diligence, the question must be submitted to the jury.").

The first step in assessing the reasonableness of plaintiffs' actions in uncovering the fraud is to assess plaintiffs' relationship with defendant prior to investing. This is important because the more involved Equitable was in plaintiffs' decisions to invest the more likely it is that plaintiffs should turn to Equitable when the investments began to sour. Plaintiffs' involvement with Equitable prior to the Wilmington House investment was nonexistent. Equitable financed the purchases, but the letters of credit were processed through Der.

The major involvement between the plaintiffs and Equitable occurred at a meeting on November 6, 1978 concerning the Eagle investment. The facts of this meeting are vital to the determination of both the equitable tolling and the merits issues. The facts of what was actually said at that meeting and the purpose for the meeting are in dispute. For the purposes of the summary judgment motion, the Court will accept the deposition testimony and interrogatory responses of plaintiffs as representing the true version of what happened at that meeting.

The November 6th meeting was attended by Der, Mason, Meszaros, Ruger, Scott and R. Kenneth Rous, a Vice-President of Equitable. Plaintiffs Ruger and Scott sought the meeting because, according to Ruger, "a bank loaning money to any venture puts a certain stamp of approval on it." Opening, Ex. 17, p. 333. In Ruger's answer to interrogatories, he describes Rous' involvement in the November 6, 1978 meeting in the following fashion:

> On November 6, 1978, Ruger and Scott met in Baltimore, Maryland to discuss their participation in Eagle with Martin Mason, Lee Der and Kenneth Rous. Rous was introduced as a Vice President of Equitable at this meeting and indicated that there would be no problem in financing the Plaintiffs

> Ruger, Scott and their corporation's investment in Eagle. Rous stated in the course of a discussion: (1) that he had reviewed the Eagle PPM; (2) that he was familiar with the investment; (3) that Der was a major syndicator of tax shelter investments and that he (Rous) was aware of Equitable's loans to Der's prior syndications; (4) that the Eagle PPM was accurate and that the Bank, based on Der's previous syndications and Eagle's loan performance, would loan the new Eagle partnership money for mining equipment and it would loan money to Eagle investors; (5) that Ruger, Scott, Data Controls North, Inc. and Descomp would have no problem receiving a loan for their investment; (6) that Data Controls North, Inc. and Descomp should establish a customer relationship (which was done by the deposit on or about November 9, 1978, of $100,000.00); and (7) that Ruger, Scott, Data Controls North, Inc. and Descomp should provide current financial statements which they did on or about November 9, 1978.

Opening, Ex. E, pp. 4-5.

Despite Rous' assertions that plaintiffs could receive financing, Ruger and Scott were denied the loans. Der told Ruger that he and Scott were denied financing because they had already received loans on Wilmington House. Answering, Ex. 13, pp. 547-48, 552-53, 575, 576. Neither Ruger nor Scott went to Rous or the bank directly to find out why their loan applications were denied. This explanation could have been plausible to plaintiffs given the fact that Stritzinger, the plaintiff who had not invested in Wilmington House, received financing from Equitable. Determining whether or not plaintiffs' response was reasonable is not determinable as a matter of law; instead, the conclusion is the type that should be made by the finder of fact.

A similar conclusion follows from the other events that eventually led to the filing of both *Hill v. Der* and this

lawsuit. Whether the events are examined jointly or individually, plaintiffs have presented at least a reasonable inference that an investor would not have been placed on inquiry notice of the fraud. The core of plaintiffs' argument, that applies to virtually all the events that defendant argues should have put plaintiffs on notice of the possibility of fraud, is that the events in issue relate to Der's and the other principals' fraudulent acts, not equitable's. The problem that arose in the investments, plaintiffs argue, would not point to Equitable's involvement in the fraud. Instead, plaintiffs contend that the failure of the investments to be as sound as represented or their eventual suspicions about Der simply led them to believe that Equitable, just like the plaintiffs, had been defrauded.

The first event which may have led plaintiffs to question their investments was the declaration of bankruptcy by Lancaster Court Associates in January 1979. Plaintiffs did not learn of this from Der or the other principals but from an unrelated third party. Opening, Ex. E, p. 101. Scott and Ruger received from Der and other principals, explanations for the bankruptcy that appeared satisfactory. *Id.* In April 1979, the Wilmington House plaintiffs received their K-1 partnership income statements that reflected losses twice the quantity that Der had represented they would be. Plaintiffs spoke to Der, who told them that he as well as plaintiffs had been lied to by another of the principals by Wilmington House. Answering, Ex. 19, p. 25.

Also in April, the Eagle plaintiffs received their K-1 statement which reflected losses greater than those projected in the Eagle private placement memorandum. Plaintiffs were again satisfied with Der's explanation for the size of the losses. In May and June 1979, plaintiffs were notified that Eagle would switch to contract mining because of new Environmental Protection Agency regulations. The last major event prior to the filing of *Hill*

v. Der was that plaintiffs learned that Der knew at the time that Wilmington House was being syndicated, that Marcus Greenfield, one of the principals in Lancaster Associates, Inc., was bankrupt. Answering Ex. 23, pp. 198-199.

Defendant contends that these various events should have put plaintiffs on notice that Equitable may have been involved in the fraud. Defendant bases its argument on the misrepresentations plaintiffs claim defendant made. First defendant's misrepresentation about the soundness of Eagle, and implicitly about the soundness of Wilmington House, should have led plaintiffs back to Equitable when the investments soured. Second, any dishonesty by Der should have also led the plaintiffs back to Equitable because Equitable's view of Der's honesty was supposedly important to plaintiffs. If, as plaintiffs argue in the merits portion of their memorandum, the bank's view of Der and the investments were important, then defendant argues that when the bank's representations proved false, plaintiffs should have inquired of Equitable as to what happened. There thus appears to be an inherent contradiction when plaintiffs' equitable tolling and merits arguments are considered simultaneously.

The plaintiffs have offered a possible factual scenario to resolve the contradiction. As discussed above, plaintiffs argue that any misrepresentations Rous made at that meeting were viewed by plaintiffs as the innocent misrepresentations of another duped party. Plaintiffs argue that it was reasonable for them to rely on the bank when the investments started to fail. Defendant contends that such a scenario strains credibility. Whether or not defendant is right, however, the facts as presented create at least the permissible inference that plaintiffs acted as claimed. The Court, therefore, cannot rule as a matter of law that plaintiffs were on inquiry notice of

Equitable's fraud at the same time that they were on inquiry notice of Der's fraud.

This Court ruled in *Hill II* that plaintiffs were on inquiry notice of fraud on the part of Equitable at least by April 1, 1980 when plaintiffs filed suit in *Hill v. Der*, 599 F. Supp. at 1077. The facts that led the plaintiffs to file suit in *Hill v. Der* also should have led them to inquire into the role of all the parties involved in the two partnership investments. For example, in *General Builders Supply Co. v. River Hill Coal*, 796 F.2d 8 (1st Cir. 1986), the Court held that even if the plaintiffs had not known of the defendant-fiduciary's personal stake in the venture, the plaintiffs should have known that the representations of defendant put defendant's own reputation on the line. Similarly, even though plaintiffs did not know exactly the extent to which Equitable was involved with Der, at the very least, Equitable's reputation was on the line after Rous' representations. Once plaintiffs saw enough problems with their investments to sue Der, they should have begun to inquire about the bank's involvement.[14]

The Court then must answer the second of the equitable tolling questions: Once the plaintiffs were on inquiry notice, were the plaintiffs reasonably diligent in uncovering the fraud? *Sleeper*, 480 F. Supp. 1264 (D. Mass. 1979). Securities plaintiffs are under a duty of "reasonable care and diligence in seeking to learn the facts which would disclose fraud," *Morgan v. Koch*, 419 F.2d 993, 997 (7th Cir. 1969), and mere unawareness of law or fact will not justify a lack of reasonable diligence. *Hupp v. Gray*, 500 F.2d 993, 996 (7th Cir. 1974). Plaintiffs bear the burden of coming forward with specific examples of their attempts to uncover the fraud.

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[14] Some cases do rule as a matter of law that a party is on inquiry notice of fraud. *See, e.g., Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690 (8th Cir. 1981); *Sleeper v. Kidder Peabody*, 480 F.Supp. 1264 (D.Mass. 1979).

Plaintiffs cite to their inquiries of Der and Equitable, discovery undertaken in *Hill v. Der*, and the letters of inquiry written to Equitable and bank regulators as evidence of reasonable diligence. As with inquiry notice, the Court holds that the facts construed in the light most favorable to plaintiffs at least permit the inference that plaintiffs acted with reasonable diligence concerning the fraud.

Plaintiffs inquiries of Der and Equitable, standing alone, are insufficient to constitute reasonable diligence. For example, in *Militsky v. Merrill Lynch, Pierce, Fenner & Smith*, 540 F. Supp. 783 (N.D. Ohio 1980), the court held that plaintiffs could not solely rely on their questioning of the defendants as evidence of reasonable diligence. At some point, as in *Militsky*, the plaintiffs must go beyond simply inquiring of the wrongdoing parties. *See also Koke v. Stifel, Nicolaus & Co., Inc.*, 620 F.2d 1340, 1342 (8th Cir. 1980); *Adams v. Martyn*, 639 F. Supp. 374 (E.D. Pa. 1986). As with the question of inquiry notice, however, the complicated nature of the fraudulent involvement of Equitable is a mitigating factor. Unlike many other cases, plaintiffs' examination of Eagle's or Alma's financial records would not reveal the extent of Equitable's involvement thus making it more difficult for plaintiffs to uncover the fraud.

Nevertheless, the plaintiffs went beyond simply inquiring of the defrauding parties. As set out in plaintiffs' memorandum, plaintiffs requested inquiries by both the State Banking Commissioner and the Federal Deposit Insurance Corporation. The letters to these banking commissions, their responses and the responses from Equitable to the bank regulators' inquiries represent more than a simple denial to general inquiries. *See* Answering, Ex. 31. Plaintiffs attempt to involve the regulators in their investigation is a significant step beyond inquiries to the parties involved. The Court does not believe that it can rule as a matter of law that it was

unreasonable for plaintiffs to rely on the decision of the banking regulators not to pursue the matter. The reasonableness of plaintiffs' decision not to follow the regulators' advice and seek help from professionals should also be decided by a jury.[15] Plaintiffs were not on inquiry notice until the filing of *Hill v. Der*, and plaintiffs acted with reasonable diligence in attempting to uncover the fraud up until the time of actual notice in 1982. As a result, the statute of limitations on the bulk of plaintiffs' claims did not begin to run until March of 1982.

C. *Statute of Limitations Summary*

This Court hold that the investment decision doctrine is inapplicable to this case but that plaintiffs are, for the purposes of summary judgment, entitled to equitable tolling of the statutes of limitations. This means that the causes of action accrued in 1977 and 1978 but the running of the statute of limitations was tolled until 1982 when plaintiffs learned of the Meszaros kickbacks.

As discussed in *Hill II*, plaintiffs' claims brought under §§ 12(2) and 15 of the Securities Act of 1933 are governed by the absolute, three year statute of limitations of § 13 of the Securities Act. 599 F. Supp. at 1078. Because these claims were not brought within three years of the date on which the cause of action accrued, summary judgment is granted for defendant on the §§ 12(2)

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[15] The Court agrees with defendant that plaintiffs cannot rely on their discovery in *Hill v. Der* as evidence of diligence. Apparently for strategic reasons, plaintiffs in that case chose not to pursue formal discovery against Der for almost two years. It was only upon beginning to pursue that discovery and on seeking document production from Mason that plaintiffs learned about Equitable's involvement in the Eagle resyndication. Such reliance on counsel in establishing strategy should not satisfy a plaintiff's duty of reasonable diligence. *Cf. Dimetry v. Department of U.S. Army*, 637 F.Supp. 269 (E.D.N.C. 1985). In fact, plaintiffs leisurely taken discovery in *Hill v. Der* may work against their reasonable diligence claim at trial.

and 15 claims.[16] The Court will not grant summary judgment based on statutes of limitations for any other claims.[17]

MERITS

With respect to the statute of limitations issue, the Wilmington House and Eagle plaintiffs could be considered interchangeably; however, for the purposes of the actual substance of plaintiffs' claim dramatic distinctions emerge. These distinctions result from this Court's holding that the investment decision doctrine does not apply.

A. *Wilmington House*

1. Securities Claims

This Court held in *Hill II* that any liability that Equitable may face for Wilmington House arose from the misrepresentations made at the November 6, 1978 meeting. Even though these misrepresentations were explicitly about Eagle, the Court held that it could not, as a matter of law, rule that the misrepresentations did not implicitly bear on the Wilmington House investment. 599 F. Supp. at 1082. Any duty to disclose arose from the misrepresentations made at that meeting.[18]

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[16] Counts 11, 15, and 19.

[17] Defendant submitted a time barred claims chart in both its Opening and Reply Memoranda. Defendant contends in that chart that if the Court denies application of the investment decision but accepts plaintiffs' equitable tolling arguments then, *inter alia*, Ruger's and Scott's § 10(b) and 10b-5 claims are barred. The one year Maryland statute of limitations applies to Ruger and Scott. Assuming that equitable tolling tolled the running of the limitations period until March of 1982, filing the lawsuit in April of 1982 was timely. Defendant's time barred chart is incorrect in this regard.

[18] Plaintiffs ask this Court to reconsider its ruling that the bank owed no duty of affirmative disclosure to the plaintiffs, citing the financing of the Wilmington House investments as evidence of an ongoing relationship. The Court stands by its holding in the prior

In Count 16, plaintiffs allege a § 10(b) and Rule 10b-5 violation by Equitable with respect to the Wilmington House securities. The Court will grant summary judgment to defendant with respect to Count 16 because plaintiffs cannot demonstrate a causal connection between the purchase of the securities and the misrepresentations. *See SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 860 (2d Cir. 1968), *cert. denied*, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969). Because the purchase was made in November 1977 and the misrepresentations occurred about one year later, plaintiffs could not have relied on the misrepresentations in making the purchase. In order to satisfy the requirement that the purchase or sale was made in connection with the misrepresentations, the misrepresentations must occur prior to or contemporaneous with the purchase or sale. *DuPont v. Wyly*, 61 F.R.D. 615 (D. Del. 1973); *Halperin v. Edwards & Hanly*, 430 F. Supp. 121 (E.D.N.Y. 1977). Mere retention of securities because of a misrepresentation does not satisfy the purchase or sale requirement. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975).

Count 17 alleges that Equitable conspired with the *Hill v. Der*, Wilmington House defendants to violate § 10(b), and Count 18 charges Equitable with aiding and abetting the principal's securities violations. In the briefs, the parties do not distinguish between the conspiracy and aiding and abetting claims brought with respect to Wlmington House and those brought with respect to Eagle. In light of the Court's holding, *supra*, that the full purchase of the Wilmington House interest

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opinion. 599 F.Supp. at 1080-81. The fact that Equitable lent money to the plaintiffs in the Wilmington House deal does not raise the relationship between the plaintiffs and the bank to the level necessary to require Equitable to disclose material information. This is especially true for the Wilmington House claims, because, prior to investing in Wilmington House, plaintiffs had absolutely no contact with Equitable.

occurred on November 11, 1977, the only facts that can be considered in either a charge of conspiracy or aiding and abetting are those that occurred prior to November 11, 1977, under the same rationale that applies to primary liability in Count 16. Thus, some of the facts which can be considered for the Eagle aiding and abetting and conspiracy counts cannot be considered for the Wilmington House counts.

In order to prove aiding and abetting liability, a plaintiff must show an underlying securities violation; knowledge of the aider and abettor; and knowing and substantial participation in the wrongdoing by the aider and abettor. *Metge v. Bachler*, 762 F.2d 621 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 798, 88 L.Ed.2d 774 (1986). As will be set out in the Eagle section, *supra*, the bulk of plaintiffs factual submissions describing the Equitable-Der relationship revoke around events in 1978. Prior to November 1977, all plaintiffs point to is the alleged kickbacks given to Meszaros. The actual facts relating to these kickbacks are somewhat vague and do not present evidence of knowing substantial participation by Equitable. Answering, Ex. 39. Plaintiffs do not present evidence linking the kickbacks received by Meszaros to the fraud, nor do they present any evidence that Equitable knew of undisclosed problems in Wilmington House. At the motion to dismiss stage, mere allegations of knowledge and participation were sufficient for this Court to continue forward. Plaintiffs can no longer rely on unsupported allegations of fact. *Tilden Financial Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604, 607 (3d Cir. 1979). The plaintiffs have not come forward with the necessary evidence to support Count 18; therefore, it will be dismissed.

The Court reaches the same result for the Count 17 conspiracy claim. In order to prove conspiracy under § 10(b) and Rule 10b-5, a plaintiff must prove the elements required for aiding and abetting liability plus an

agreement between Equitable and the other conspirators. *See In re Falstaff Brewing Antitrust Litigation*, 441 F. Supp. 62 (E.D. Mo. 1977). As stated above, there are no facts to indicate aiding and abetting. And, unlike the Eagle claims discussed, *supra*, there are not sufficient facts from which an agreement can be inferred. Accordingly, Count 17 will be dismissed.

2. Common Law Negligence

In Count 20, plaintiffs allege that Equitable was negligent in supervising its employees, specifically Meszaros, with respect to the Wilmington House claims. As discussed in the securities law section, the bank did not owe the plaintiffs any affirmative duty of disclosure. Plaintiffs have not demonstrated that a bank is under a duty to insure that an investment is sound before loaning money to a customer on that investment.[19] Prior to investing in Wilmington House, plaintiffs had no direct contact with any representative of Equitable; thus, Equitable did not play a significant role in plaintiffs' decision to invest. Even assuming there is a duty, plaintiffs' claim that the breach occurred because Equitable negligently allowed the violation of Counts 16, 17, and 18. However, as discussed above, plaintiffs have failed to prove the allegations in those counts. Summary judgment will therefore be granted to Equitable for Count 20.

3. RICO

In Count 23, plaintiffs sued Equitable for a violation of RICO, 18 U.S.C. § 1962(c) under 18 U.S.C. § 1964 (c) "for its participation in the sale of limited partner-

[19] A distinction exists between the bank's duties with respect to the Wilmington House and the Eagle investors. That distinction arises because the plaintiffs sought Equitable's advice with respect to the Eagle investment, and the plaintiffs deposited substantial money at Equitable at the time of the Eagle investment. A discussion of the bank's duty with respect to the Eagle investment is, *infra*, in the Eagle section of the opinion.

ship interests in Wilmington House Associates." Second Amended Complaint, ¶ 179. Because the predicate acts to the RICO claim, embodied in Counts 16, 17, and 18 have not been proven, the Court will also grant summary judgment on the RICO Count.

4. Summary of Wilmington House Claims

As the above discussion illustrates, this Court's holding that the investment decision doctrine does not apply to plaintiffs' investment is fatal to the Wilmington House plaintiffs' claim. Summary judgment will be granted in defendant's favor for all the remaining Wilmington House Counts: Counts 16, 17, 18, 20, and 23.

B. *EAGLE*

1. Securities Claims

The § 10(b) and 10b-5 claims asserted against Equitable for its involvement in the Eagle limited partnership arise from the misrepresentations Rous allegedly made at the November 6, 1978 meeting. *Hill II*, 599 F. Supp. at 1082.

> Plaintiffs not only state a claim with respect to the affirmative misrepresentation themselves, but also state a claim with respect to Rous' failure to disclose material information which rendered the representations false or misleading, and Equitable's intentional or reckless failure to subsequently disclose newly acquired information which rendered the representations false or misleading at the time of representation.

Id. (footnote and citations omitted).

Defendant moves for summary judgment on the grounds that the statements made by Rous were not misrepresentations, that plaintiffs did not rely on Rous'

statements, and that the statements made were not material.[20]

Defendant first argues that because, by plaintiffs' own admission, Eagle was a sound investment, Rous did not make a misrepresentation at all. This argument is based on deposition testimony from both Ruger and Scott. *See* Opening, Exs. I, K. Though it is true that plaintiffs seem unsure about the soundness of the Eagle investment other facts may lead a jury to conclude that the Eagle investment was not sound. The facts of the resyndication, the settlement of the Ward lawsuit, and the Alma loan to be repaid by Eagle are all factors which enter into a determination of the soundness of the Eagle investment.

Plaintiffs claim that Rous' failure to elaborate on the extent of the Der-Equitable relationship was a misrepresentation. Defendant argues that because plaintiffs knew that Equitable would be lending money to the partnership for equipment had plaintiffs known more facts about the money owed to the bank, this would have only made the plaintiffs more reliant on the bank. The problem with this argument is that it is conceivable that, had the plaintiffs known the full extent of the Equitable-Der relationship, plaintiffs may not have relied on Equitable's view as the opinion of a knowledgeable and relatively independent third party. Once Equitable's interest in the investment

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[20] Defendant also disputes that the statements alleged in the interrogatories and the depositions were made. What Rous actually said at the November 6 meeting is, however, a question of fact to be decided by a jury. The Court notes that plaintiffs' deposition testimony does not claim Rous said as much as do their interrogatories; however, the interrogatories, as well as the depositions, are a factual submission. For the purposes of summary judgment, the Court will give the plaintiffs benefit of the doubt. Even on a narrower view of the misrepresentations made, testified to by Ruger, Rous said that the investment was sound. Opening, Ex. M. pp. 445-446. Once this representation was made, the bank, as held in *Hill II* had an affirmative duty to disclose material facts relevant to the investment.

became too great, plaintiffs may have felt that Equitable was, along with Der, trying to sell the investment. Defendant infers from the facts that plaintiffs would have relied more on the bank if plaintiffs had known all the facts; however, as set out above, there exists another plausible inference from the facts, thus precluding a finding of summary judgment.[21]

The last question to be addressed for the § 10(b) and 10b-5 violations is Equitable's liability for the actions of Rous. Plaintiffs contend that the bank is primarily liable for the acts of Rous because Rous was an officer of the bank. This view comports with the Third Circuit's view in *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 182 n. 8 (3d Cir.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982):

> Officers are able to make policy and generally carry authority to bind the corporation. Their actions in behalf of the corporation is therefore primary, and holding a corporation liable for their actions does not require respondeat superior.

Plaintiffs have presented enough evidence of Rous' role as an officer in Equitable to allow for the possibility of primary liability.

In *Hill II*, this Court stated its opinion that the bank would not be vicariously liable for the acts of its employees. 599 F.Supp. at 1982 n. 21. On further development of the facts, however, this Court holds that a bank can be vicariously liable for acts by its employees done

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[21] Plaintiffs' deposition testimony is somewhat sparse on this point, but Ruger testified that he wanted "assurance form a party, a third party other than Mr. Der" before entering into the investment. Answering, Ex. 11, p. 337. Equitable's status as a party "other than Mr. Der" becomes weaker as Equitable's relationship with Der appears to be closer. The facts of the relationship that Rous failed to disclose when affirming the soundness of the investment thus become material.

on behalf of the corporation that constitute securities violations. This view results from comparing the facts of this case to those of *Rochez Brothers v. Rhoades*, 527 F.2d 880 (3d Cir.1975), and those in *Sharp v. Coppers & Lybrand*, *supra*.

In *Rochez Brothers*, the Third Circuit held that a corporation could not be vicariously liable for the securities violations of its employees. That case involved the fraudulent sale of a corporation's stock by the president of the corporation to the executive vice-president of the corporation. That court stated that:

> If we were to apply *respondeat superior* as appellant wishes, we would in essence impose a duty on a corporation to supervise and oversee the activities of its directors and employees when they are dealing *with their own corporate stock as individuals, and not for the corporation or for the benefit of the corporation.* 527 F.2d at 885 (emphasis added).

By contrast, the instant case involves acts by Rous not for his own interests but for the interests and for the benefit of the corporation.

In *Sharp*, the Third Circuit held that there was a narrow exception to the *Rochez* rule of no vicarious liability. The court held that an accounting firm was vicariously liable for 10b-5 violations by its employees because the accounting firm knew that the investing public would place a high level of confidence in the opinion letters issued by the accounting firm. Although the Court does not believe that the bank's duty goes so far as to require it to disclose relevant facts to prospective lenders, a bank is under a duty not to misrepresent to prospective investors facts when those investors request information from the bank. A commercial bank stands in a position of trust to the investing public and should be under a duty to ensure that its officers are not misrepresenting

facts to the investing public.[22] In *Sharp*, the accounting firm received a benefit in its compensation for issuing the opinion letters; in the instant case, the bank's benefit is two-fold—it potentially received income from loans and it found investors to bail out Alma. In such a situation, the bank should be sure that its employes are not misrepresenting facts to potential customers.

Plaintiffs next contend that Equitable is liable for aiding and abetting Der's § 10(b) violations and for conspiring to violate § 10(b).[23] Plaintiffs have offered sufficient facts to survive a summary judgment motion. Defendant's actions in the resyndication of Alma into Eagle, the settlement of the Ward lawsuit, and the misrepresentations made by Rous, all are facts which could lead a jury to conclude that the defendant knowingly and substantially participated in Der's securities violations.[24]

The only additional ingredient necessary for a conspiracy claim is evidence of an agreement. Defendant makes much of the fact that plaintiffs cannot point to any evidence of an explicit agreement; however, it would be permissible for a jury to infer that there was an agreement from the acts taken by the parties.[25]

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[22] A distinction exists between an affirmative duty to disclose, which the Court has not found in this case, and a duty to supervise against misrepresentations by employees. Simply because a bank's duty in a case like this is not equivalent to a duty of a fiduciary does not mean that the bank has no duty at all. *See, supra*, n. 18 and *Hill II*, 599 F.Supp. at 1080-1081 (holding a bank in Equitable's position, unlike a fiduciary, does not have an affirmative duty to disclose).

[23] The legal standards for these violations are set out in the Wilmington House section of this Opinion.

[24] Because of this Court's holding on the investment decision doctrine question, acts taken after the purchase of the Eagle interests are not relevant to either the underlying § 10(b) violations or to any aiding and abetting claims.

[25] Defendant argued quite compellingly at oral argument that if Equitable was a participant in this fraud, it made no sense for it

Plaintiffs' final federal securities claim is based on the "controlling person" provision of the securities laws:

> Every person who, by or through stock ownership, agency, or otherwise, or who pursuant to or in connection with an agreement or understanding with one or more other person by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist. 20(a) of the Securities Act of 1934; 15 U.S.C. § 77*o*.

In determining whether a party controls another, "courts have given heavy consideration to the power or potential power to influence and control the activities of a person." *Rochez Bros.*, 527 F.2d at 890. In *Hill II*, the Court doubted the merits of plaintiffs' § 20(a) claim but permitted it to go forward to learn the circumstances surrounding the resyndication. 599 F.Supp. at 1084.

In response to defendant's summary judgment, plaintiffs only factual support for controlling person liability is the fact that Alma and Der owed the bank money. Though no Third Circuit case discusses whether or not a creditor-debtor relationship creates controlling person status, the Eighth Circuit has refused to find that the primary lender of a corporation was a controlling person of that corporation. *Metge v. Baehler*, 762 F.2d 621, 632 (8th Cir.1985). Similarly, in *Wright v. Schock*, 571 F. Supp. 642, 644 (N.D.Cal.1983) *aff'd.*, 742 F.2d 541 (9th

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to deny loans to some of the plaintiffs because that denial seriously jeopardized the Eagle deal. That argument, however, raises a factual question for a jury to decide.

Cir.1984), the court declined to find that a bank was a controlling person when the claim was based upon the fact that the bank's loans and other services were indispensible to the operation of the allegedly controlled corporation. Plair iffs have not provided any evidence beyond indebtedness to create controlled person status. Such a showing is insufficient to support a claim for control person liability; therefore, summary judgment will be granted for Count 14.

2. Common Law

Plaintiffs raise four state common law claims against Equitable for the Eagle investment: deceit and fraud; conspiracy to deceive and defraud; negligent misrepresentation; and negligence. Defendants claim that the deceit and fraud claim should be dismissed, because the statement that the investment was sound is a statement of opinion and not of fact.[26] Under Maryland law, a claim for fraud requires that the statement that is the basis of fraud be a statement of fact. *Buschman v. Codd*, 52 Md. 202, 207 (1879). Defendant contends that Rous' statement that Eagle was a sound investment is a statement of an opinion and cannot substantiate a fraud claim. Defendant's argument is incorrect. When Rous was asked to comment on the investment the question was predicated on the fact that the plaintiffs had all the information material to the investment before them. A jury may conclude that Rous defrauded plaintiffs by stating the investment was sound without disclosing the facts of the Alma resyndication when Rous knew that plaintiffs had no knowledge of the resyndication. Similarly, a jury could infer an agreement, or conspiracy, to defraud based on the acts taken prior to the November 6th meeting and the acts taken at the November 6th

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[26] Again, as in the federal securities claims, any duties that Equitable had arose out of the November 6th representations.

meeting. Summary judgment will therefore be denied for Counts 3 and 9.[27]

The remaining two common law counts are negligent misrepresentation and negligence.[28] The principle elements of the tort of negligent misrepresentations in Maryland are the following:

> (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
>
> (2) the defendant intends that his statement will be acted upon by the plaintiff;
>
> (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
>
> (4) the plaintiff, justifiably, takes action in reliance on the statement; and
>
> (5) the plaintiff suffers damage proximately caused by the defendant's negligence. *Martens Chevrolet v. Seney*, 439 A.2d 534, 292 Md. 328 (1982); *Virginia Dare Stores v. Schuman*, 1 A.2d 897, 175 Md. 287 (1938).[29]

Most of the issues presented by the above elements are identical to those presented by the securities claims and

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[27] Defendant contends that plaintiffs have failed to raise any genuine dispute as to a material fact with respect to the common law claims. Reply at 46. Therefore, defendant argues, this Court could grant summary judgment for the claims. The problem with this argument is the facts, as stated, do not compel a finding for defendant as a matter of law. As in the equitable tolling section, *supra*, a jury could permissibly reach two different conclusions based upon the existing facts. In such a situation, summary judgment is inappropriate.

[28] Counts 12 and 13.

[29] A plaintiff can plead separate counts of negligent misrepresentation and deceit based on the same nucleus of facts. *Martens Chevrolet*, 439 A.2d at 539.

the common law fraud claim. As in those causes of action, questions of fact remains.

The new question that arises for the negligent misrepresentation count—and for the negligence count as well—is the question of duty; that is, what duty of care does Equitable owe the plaintiffs in the circumstances of this case? In *Jacques v. First National Bank*, 307 Md. 527, 515 A.2d 756 (1986), the Maryland Court of Appeals ruled that a lending bank had a duty of reasonable care in processing the loan applications of a potential borrower. Although the nature of the duty in *Jacques* is different from the duty plaintiffs assert in the instant case, the rationale for finding that the bank had a duty in *Jacques* leads this Court to conclude that a duty exists here as well.

In finding a duty in *Jacques*, the Maryland court emphasized the existence of a contractual relationship between the parties. 515 A.2d at 760. When a tort cause of action involves economic loss, the court held that something approaching contractual privity would be necessary to create a tort duty. The legal relationship in *Jacques* was based upon the contract between Jacques and the bank: the bank promised to lock in a particular interest rate and process the loan application; in exchange, Jacques paid a loan application fee.[30] In the instant case, the plaintiffs sought advice and financing from the defendant. According to Ruger's testimony, he and Scott deposited substantial money at Equitable in order to establish a banking relationship. Answering, Ex. 35, pp. 479-486. They decided to establish this relationship based on Rous' comments to them. *Id.* Thus, as in *Jacques*, plaintiffs gave the bank consideration in

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[30] More than the mere filing of a loan application was necessary to create the necessary contractual relationship. Once the bank agreed to process the application, a duty came into existence. 515 A.2d at 762.

exchange for the bank's promise to fairly process a loan application.

Under the reasoning of *Jacques*, some duty exists between Equitable and plaintiffs. The duty plaintiffs seek here is greater than the duty imposed in *Jacques;* this Court must determine if the duty imposed on Equitable should cover negligent misrepresentation. First, though the tort duty arises from the contractual relationship, the duty is not limited by the bounds of that contract; otherwise, the tort duty and the contractual obligation would be identical. Second, the *Jacques* court's discussion of the nature of the banking business and the duties resulting indicates that Maryland courts would find a duty against negligent misrepresentation in the banking context:

> The banking business is affected with the public interest. Traditionally banks and their officers have been held to a high degree of integrity and responsiveness to their public calling. Although not directly applicable to the respondent because of its status as a national bank, the requirements imposed by the Maryland legislature illustrate this State's policy concerning the bank industry . . . The recognition of a tort duty of reasonable care under the circumstances presented by this case is thus consistent with the policy of this State as expressed by the Legislature, and reasonable in light of the nature of the banking industry and its relation to public welfare. 515 A.2d at 764.

This policy rationale is equally appropriate to finding a duty against negligent misrepresentation under the facts of this case. Plaintiffs solicited Rous' view of the Eagle investment, as well as financing from the bank. Rous suggested that plaintiffs deposit money at the bank while representing that plaintiffs would receive loans and that the investment was sound. Whether or not he

should have told plaintiffs more about the bank's relationship to Eagle is a jury question. Based on the meeting and the resulting deposits, a contractual relationship came to exist which required the bank to exercise due care in communicating facts to plaintiffs.[31] Because this Court finds that the bank had a duty to these plaintiffs and all the other requirements present factual questions, summary judgment will be denied for the negligent misrepresentation count.

For similar reasons, the Court will deny the summary judgment motion with respect to the negligence count. The extent to which the bank should have been supervising employees like Rous and Meszaros is a question of fact. Similarly, whether negligent supervision caused the plaintiffs' injury is a question to be decided by a jury. As in the negligent misrepresentation count, the Court finds a duty based upon the *Jacques* case.

3. RICO

In order to state a claim under 18 U.S.C. § 1962(c), a plaintiff must demonstrate that a person employed by or associated with an enterprise conducted the affairs of that enterprise through a pattern of racketeering activity. *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 788 (3d Cir.1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985).[32] In *Hill III*, the Court denied a Fed.R.Civ.P. 12(b)(6) motion to dismiss these RICO counts; now, defendant contends that plaintiffs' RICO counts should be dismissed for failure to present facts of an "enterprise", or of a

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[31] The issuance of letters of credit alone is not enough to create this duty. Only when the loans are issued or it is represented that they will be issued in conjunction with representaions about an investment's quality in exchange for deposits does a duty arise.

[32] Technically, 18 U.S.C. § 1962(c) represents a criminal violation. A civil plaintiff can recover treble damages based on a violation of § 1962(c), however. 18 U.S.C. § 1964(c).

"pattern of racketeering activity." [33] Defendant also contends that plaintiffs have failed to present the necessary evidence to support a claim of conspiracy to commit a RICO violation pursuant to 18 U.S.C. § 1962(d).

Plaintiffs pled two potential enterprises in this case; either the Eagle partnership or Equitable in combination with the other Eagle defendants,[34] is the enterprise through which the plaintiffs claim the racketeering activity took place. Plaintiffs have provided sufficient evidence for their claim that Eagle was the enterprise through which the pattern of racketeering activity occurred but have not provided sufficient evidence for their claim that the enterprise was Equitable, Eagle, and the other Eagle defendants.

The definition of enterprise under RICO is "any individual, partnership, corporation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Eagle is a limited partnership that easily fits into the first half of this definition. In order to prove that Equitable, Eagle, and some or all of the *Hill v. Der* defendants constitute an enterprise, however, plaintiffs must satisfy the three part test established in *United States v. Riccobene*, 709 F.2d 214 (3d Cir.1983), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983).

> In *Riccobene*, this court stated that in order to establish the existence of an enterprise, the govern-

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[33] The RICO counts relveant to Eagle are Counts 21 and 22 of the Second Amended Complaint. Count 21 is a claim for violation of RICO, and Count 22 is a claim for conspiracy to commit a RICO violation.

[34] Equitable contends that the second potential enterprise makes no sense because there are no other defendants in this case. The interrogatory answers' reference to the "Eagle defendants" refers not to other defendants in this action but to the defendants named in *Hill v. Der* and listed in § 15 of the Second Amended Complaint: Lee P. Der, Lee P. Der, Inc., D & S Financial, Inc., Eagle, Alma, Der-Mas, Inc., and Roger Ball.

> ment must demonstrate (1) that the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; (2) that the members of the enterprise function as a continuing unit with established duties; and finally (3) that the enterprise must be separate and apart from the pattern of racketeering activity in which it engages. 709 F.2d at 221-224. *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 789 (3d Cir. 1984).[35]

Plaintiffs have not offered any evidence to satisfy the first prong of the *Riccobene* test. There is nothing to indicate that Equitable formed an ongoing organization with "some sort of framework or superstructure" with the *Hill v. Der* defendants.

Plaintiffs will have to rely on Eagle alone as the enterprise for purposes of their RICO claim. Plaintiffs' factual submissions concerning the August 18 and November 6 meetings are sufficient to establish that Equitable was at least peripherally involved in the affairs of the Eagle enterprise. "Numerous courts have held that indirector peripheral involvement in the affairs of the enterprise such as that alleged of Equitable, is sufficient to establish a claim under RICO. *See, e.g., Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986); *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977)." *Hill III*, 642 F. Supp. at 1018.

Equitable's contention that a pattern of racketeering activity cannot exist when only one scheme is involved relies on district court precedent that this Court has declined to follow in the past. Defendant relies on *Fleet Management Systems, Inc. v. Archer-Daniels-Midland*

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[35] *Seville* applied the *Riccobene* test to a civil RICO claim. *Riccobene's* test is based upon the Supreme Court's holding in *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

Co., 627 F. Supp. 550 (C.D. Ill. 1986), for the proposition that more than one scheme is necessary. In *Hill III* and *Mullin v. Bassett*, 632 F. Supp. 532 (D. Del. 1986), this Court held that it would follow a contrary string of precedent which holds that a pattern may be proven even when only one fraudulent scheme exists. *See, e.g., Bank of America v. Touche Ross & Co.; Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089 (N.D. Ill. 1985).

Provided the predicate acts for the pattern are sufficiently different and ongoing, a RICO violation can exist even if there is only one fraudulent scheme. Plaintiffs have provided sufficient factual support for the allegations presented to satisfy the pattern requirement to survive a summary judgment motion.

In order to find a defendant liable for a RICO conspiracy, something other than the agreement to commit predicate actions must be shown. *Hill III*, 642 F. Supp. at 1020. The defendant need not, however, have agreed to commit personally two or more predicate acts. *Id.* In the Third Circuit, "to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts and need not agree to commit personally those acts." *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 275, 88 L.Ed.2d 236 (1985). In reaching this result, the Third Circuit adopted the reasoning of *United States v. Carter*, 721 F.2d 1514, 1531 (11th Cir.), *cert. denied*, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984): "When . . . a defendant agree[s] to participate in the conduct of an enterprise's affairs with the objective of violating a substantive RICO provision, it is not necessary that the defendant agree to personally commit two predicate acts for the required pattern of racketeering activity." Direct evidence of an agreement is unnecessary; instead, proof may rest upon inferences drawn from relevant and competent circumstantial evidence.

United States v. Carter, 721 F.2d at 1532; *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). The facts of the August 18 meeting and the Der-Equitable relationship leading up to and including the November 6 meeting provide sufficient evidence for a possible jury finding that an agreement existed.

CONCLUSION

For the reasons stated in the foregoing opinion, summary judgment will be granted in favor of defendant for the Wilmington House claims and will be denied for most of the Eagle claims. The Eagle claims based on 15 U.S.C. §§ 77*l*, 77*o*, and 78t, however, are dismissed. An Order will enter in conformity with this Opinion.

AMENDMENT TO OPINION OF JANUARY 9, 1987

CALEB M. WRIGHT, Senior District Judge.

Defendant Equitable Bank filed a motion to alter or amend the judgment this Court issued on January 9, 1987.[1] Defendant's primary contention is that the § 10(b) and Rule 10b-5 claims of the Non-Delaware plaintiffs, Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc. should be dismissed on statute of limitations grounds.

In the January 9, 1987 Opinion, the Court held that the investment decision doctrine did not apply; accordingly, the non-Delaware plaintiffs purchased their Eagle shares in November of 1978. Op. at 9-16. Defendant contends that this holding should have resulted in the dismissal of the non-Delaware plaintiffs' securities claims because the Maryland Blue sky statute of limitations, the applicable statute of limitations, has an outside bar of

[1] This amendment is to be attached to the January 9, 1987 Opinion. Citations to that opinion will be to "Op.".

three years. MD. CORPS. & ASS'N. CODE ANN. § 11-703(f). This outside time limitation means that an action for securities fraud must be brought within three years of the purchase or sale, regardless of any tolling considerations.[2] In *Hill I*, this Court held that the non-Delaware plaintiffs' securities claims were governed by Maryland law. "[A] 10b-5 action in Maryland may not be brought later than one year after a reasonable date of discovery or three years after the contract of sale, whichever comes first. *See O'Hara v. Kovens*, 625 F.2d [15], 17 [(4th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981)]." 562 F. Supp. at 1336. *See also Morley v. Cohen*, 610 F. Supp. 798 (D. Md. 1985).

In the Opinion issued on January 9, 1987, the Court neglected to apply the three year outside bar and only applied the "one year from discovery" provision of the Maryland statute. Because the Court held that factual questions remained with respect to the plaintiffs' equitable tolling arguments, the Court held that the securities claims could not be dismissed on statute of limitations grounds. If an absolute three year bar applied, however, the non-Delaware plaintiffs' claims would be barred because the suit was filed more than three years after the purchase. The Court now holds that defendant has correctly read *Hill I*, *Morley* and the Maryland statute; therefore, the three year outside bar should have been applied, and the securities claims of the non-Delaware plaintiffs in Eagle will be dismissed.

Indeed, in briefing on an earlier motion before this Court, plaintiffs recognized that this Court had held the

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[2] Federal securities claims brought under § 10(b) and Rule 10b-5 are governed by "borrowed" state statutes of limitations. The Court has ruled that the Delaware statute of limitations should apply for the Delaware plaintiffs. *Hill I*, 562 F.Supp. at 1337. The only Delaware resident in the Eagle portion of this litigation is James Stritzinger. There is no outside bar to the Delaware statute of limitations that the Court has ruled should apply to this case.

outside bar to apply to the instant case: "It is also the law of this case that the statute of limitations governing the non-Delaware plaintiffs' 10b-5 claims is contained in Maryland's Blue Sky Law, MD. CORPS & ASS'NS. CODE ANN. § 11-703(f), and that under it such claims may not be brought later than one year after a reasonable date of discovery of the facts or three years after the contract of sale, whichever occurs first." Plaintiffs' Memorandum in Opposition to Motion of Defendant Equitable Bank, National Association to Dismiss Amended Complaint, January 23, 1984, pp. 12, 13. The Court will not now reconsider a decision it made for this case in 1983 that all the parties understood to be the law of this case. Unfortunately, in the January 9, 1987 Opinion, the Court failed to apply the three year outside bar that applied to the non-Delaware plaintiffs. Footnote 17 of the Opinion is thus incorrect and should be disregarded. Op. at 26. Counts 1, 2, 4, 5, 6, 7, 8 and 10 will therefore be dismissed as to the non-Delaware plaintiffs.

The Court's decision that the purchase of Eagle securities occurred in the fall of 1978 has also led defendant to seek dismissal of Count 5 with respect to all plaintiffs. Count 5, one of the several § 10(b) and Rule 10b-5 counts alleged in the second amended complaint, is primarily based upon events that transpired in 1979. Defendant, therefore, contends that the misrepresentations alleged did not occur in connection with the purchase or sale of a security. As this Court noted in dismissing the Wilmington House securities claims, summary judgment should be granted to defendant when the plaintiffs cannot demonstrate a causal connection between the misrepresentation and the purchase or sale. Op. at 27. Defendant argues that the same reasoning should result in the dismissal of Count 5.

Plaintiffs' two arguments in response are to no avail. First, plaintiffs contend that because they have incorporated all prior factual allegations of the complaint into

Count 5, there are facts involved in Count 5 that occurred prior to or contemporaneous with the purchase.[3] The problem with this argument is that all those other factual allegations are included in other securities allegations. What distinguishes Count 5 from the other securities counts are the allegations concerning 1979. Those allegations are irrelevant to a claim of a § 10(b) or 10b-5 securities violation.[4] If the only relevant factual allegations in Count 5 are those that are already found in the other securities counts, there is no need for Count 5. Plaintiffs also argue that they now have evidence to indicate that Equitable knew that Der was being investigated prior to the purchase. Count 5 of the complaint does not allege this, nor have plaintiffs ever attempted to amend this Count to include such an allegation. Count 5 of the complaint will therefore be dismissed.

Defendant's in their motion to amend contend that the RICO counts as to the non-Delaware plaintiffs should be dismissed once the predicate acts of securities fraud have been dismissed. Defendant claims that this follows under the same reasoning the Court applied in dismissing the RICO counts with respect to Wilmington House; however, the Wilmington House securities claims were dismissed on their merits while the Eagle securities claims will be dismissed on statute of limitations grounds. This Court's dismissal in Wilmington House represented a holding that no securities violation ever occurred. By contrast, the dismissal of the Eagle claims is not based

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[3] The important factual allegation in Count 5 is that Equitable knowingly omitted to notify the plaintiffs that the SEC issued an Order on July 16, 1979 finding that Der and Lee P. Der, Inc. had willfully violated several of the securities laws in connection with the sale of limited partnership interests and that the Order suspended the broker/dealer registration of D & S Financial, Inc., suspended Der from association with any broker or dealer and censured Lee P. Der, Inc.

[4] They may be relevant with respect to the equitable tolling arguments advanced by plaintiffs.

on a holding that the violation did not occur; rather, recovery based upon that violation is simply time barred.

This Court will follow the *Morley* court in holding that a RICO claim can survive even if recovery for the predicate acts that compromise part of the RICO claim cannot survive. In *Morley*, the Maryland District Court ruled that the applicable state statute of limitations for a civil RICO claim in Maryland is MD. CTS. & JUD. PROC. CODE ANN. § 5-101. 610 F. Supp. at 809. The general fraud provision does not contain an outside bar like the Blue Sky statute of limitations. Thus, the *Morley* court implicitly applied the federal equitable tolling doctrine in not dismissing the RICO claims as time barred. *Id.* The RICO claim survived in *Morley* despite the fact that the plaintiff could not recover for the predicate acts of securities fraud.

In reaching this decision, the Maryland district court applied the reasoning the Third Circuit Court of Appeals has used in criminal RICO actions. *See United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977); *United States v. Davis*, 576 F.2d 1065, 1067 (3d Cir. 1978), *cert. denied*, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978). In both these cases, the Third Circuit held that the fact that the statute of limitations had run on the predicate acts did not mean that those predicate acts could not be considered for purposes of proving a RICO violation. The violation of RICO is a separate violation from the individual predicate acts. "In short, RICO does not provide a remedy for the mere commission of the predicate acts. Rather, RICO prohibits the use of the predicate acts to invest in, acquire or maintain an interest in, or conduct the affairs of, an enterprise whose activities affect interstate commerce. 18 U.S.C. § 1962." *Morley*, 610 F. Supp. at 808. Applying the statute of limitations from the predicate acts to RICO would be unrealistic in that the different predicate acts have different statutes of limitations; therefore, it is

more appropriate to determine a statute of limitations for RICO as an offense distinct from the various predicate acts. It is true in the instant case as well that the RICO violations alleged are distinct from the particular securities violations. The fact that the predicate securities claims are time barred does not mean that the RICO claims should be dismissed. Defendant's motion to dismiss these claims will be denied. As in *Morley*, the general fraud provision of Maryland will be applied to the civil RICO claim.[5] The factual issues of equitable tolling applicable to the securities claims apply to the RICO claims as well. Because the non-Delaware plaintiffs' RICO claims have not been dismissed, the Court retains jurisdiction over their state law claims.

An Order will enter in conformity with this Opinion.

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[5] Following the *Morley* court's determination of the proper state statute of limitations to apply is in accordance with the Third Circuit Court of Appeals holding "that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitation for *all* civil RICO claims." *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 349 (3d Cir.) (holding the Pennsylvania "catch-all" limitations period to be the appropriate period for civil RICO) (emphasis in original), *cert. granted in part*, —— U.S. ——, 107 S.Ct. 569, 93 L.Ed.2d 573 (1986). The Court believes that following the *Morley* court's approach will promote the goal of uniformity the Third Circuit discussed in *Malley-Duff*.

APPENDIX C

UNITED STATES DISTRICT COURT
D. DELAWARE

Civ. A. No. 82-220 CMW.

JOHN T. HILL, *et al.*,
Plaintiffs,

v.

EQUITABLE BANK, N.A.,
Defendant.

Aug. 29, 1986

CALEB M. WRIGHT, Senior District Judge.

Defendant Equitable Bank, N.A., has moved to dismiss the four counts of plaintiffs' Second Amended Complaint alleging violations of the Racketeering Influenced and Corrupt Organizations Act ("RICCO"), 18 U.S.C. §§ 1961-1968. For the reasons set forth below, the Court will grant the motion in part and deny the motion in part.

I. BACKGROUND

This litigation arises out of an alleged scheme to defraud plaintiffs in relation to the sale of interests in two limited partnerships, Wilmington House Associates ("Wilmington House") and Eagle Associates ("Eagle"). Although the Court previously has given extensive recitations of the underlying facts, *see, e.g.*, 562 F. Supp. 1324 (D. Del. 1983), and 599 F. Supp. 1062 (D. Del. 1984),

it must cover much of the same ground here to put the current motion in context.

On November 11, 1977, plaintiffs John T. Hill, Thomas and Patricia Ruger, Virgil and Marie Scott, and Descomp, Inc., a corporation controlled by Messrs. Ruger and Scott, entered into subscription agreements to purchase shares of Wilmington House, a limited partnership formed for the purpose of acquiring and operating an apartment complex. Lee P. Der orchestrated plaintiffs' purchase of the shares and served as general partner of Wilmington House through Lee P. Der, Inc., a company wholly owned by Der.

Plaintiffs paid for their shares by means of a down payment on November 11, 1977, and subsequent installment payments made on May 1, 1978, February 1, 1979, February 1, 1980, and February 1, 1981. The installment payments were financed through irrevocable letters of credit issued by Equitable on December 18, 1977. Equitable previously had sent applications for the letters of credit into Delaware. Approval of the letters of credit occurred through the recommendation of Equitable vice-president Stephen Meszaros, and possibly other bank employees, who allegedly received kickbacks from principals of Wilmington House.

On November 2, 1976, Plaintiffs Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc., a corporation controlled by Ruger and Scott, entered into subscription agreements to purchase shares of Eagle, a limited partnership engaged in the coal mining business in West Virginia. Plaintiff James T. Stritzinger entered into a similar subscription agreement on November 30, 1978. Lee P. Der also orchestrated plaintiffs' purchase of Eagle shares and served as general partner of Eagle through Der-Mas, Inc., a corporation Der controlled.

Eagle was formed as the resyndication of a predecessor limited partnership, Alma Coal Properties Ltd.

("Alma"). The resyndication of Alma into Eagle was part of an allegedly fraudulent scheme in which Equitable participated. In August 1978, Ward Development Co. ("Ward"), the sole limited partner of Alma, sued Der, the partnership, and others, claiming breaches of the partnership agreement. On August 31, 1978, Ward obtained a temporary injunction prohibiting Equitable from making payments on letters of credit issued to Ward to finance its purchases of Alma shares. This lawsuit and the possibility of Ward's withdrawal from Alma placed Alma on the brink of bankruptcy and created a substantial risk that Alma would default on Equitable's loans to the partnership. To stave off this possibility, Equitable and Der and other Alma principals in August, 1978, entered into a plan to conceal the lawsuit by foregoing collection of the balance due on Ward's partnership interest and to resyndicate Alma as Eagle. Proceeds from the sales of new partnership interests would be used to retire part of Equitable's loans to Alma, and part of the debt eventually was paid off.

On November 6, 1978, Der set up a meeting in which Messrs. Ruger and Scott met with R. Kenneth Rous, an Equitable vice-president, to discuss, among other things, financing for plaintiffs' purchases of Eagle shares. At the meeting, Rous allegedly omitted to disclose material information about the partnership and made certain affirmative misrepresentations. These misrepresentations included statements that Eagle was a sound investment, that the Eagle private Placement Memorandum was accurate, and that Equitable had no conflicts of interest in the sale of Eagle shares.

James Stritzinger paid for his Eagle shares by means of a down payment on December 18, 1978, and subsequent installment payments on June 1, 1979, and June 1, 1980. Equitable provided a loan to finance Stritzinger's down payment and issued letters of credit to finance his installment payments.

Ruger, Virgil and Marie Scott, and Data Controls North, Inc., paid for their Eagle shares by means of a down payment on December 15, 1978, and subsequent installment payments on June 1, 1979, and June 1, 1980. Equitable declined to issue letters of credit to finance their installment payments, and plaintiffs financed the installment payments by other means.

On July 16, 1979, the Securities and Exchange Commission ("SEC") issued an order finding that Der and Lee P. Der, Inc. had willfully violated several provisions of the securities laws in connection with their offers and sales of limited partnership interests. The order also suspended the broker-dealer registration of D & S Financial, Inc. ("D & S"), a broker-dealer controlled by Der which had handled plaintiffs' applications for loans and letters of credit to finance their purchases of Wilmington House and Eagle shares. Equitable learned of the SEC order on July 24, 1979, but failed to inform plainiffs of its content.

On April 1, 1980, plaintiffs filed suit against Der, the partnerships, and others involved in the sale of partnership interests to plaintiffs, alleging they were fraudulently induced to purchase Wilmington House and Eagle shares through various misrepresentations. *Hill v. Der*, No. 80-146 (D.Del., filed April 1, 1980).

On February 20, 1981, Stritzinger wrote a letter to about possible improprieties regarding Equitable's relationship with Der and D & S, and Equitable's financing of Stritzinger's purchase of Eagle shares. The Commissioner forwarded this letter to Equitable with a request for an explanation. Hill wrote a letter to Equitable on March 9, 1981, inquiring about similar improprieties in connection with Equitable's financing of plaintiffs' purchases of Wilmington House shares and whether Equitable had terminated any employees as a result of such im-

proprieties.[1] On March 17, 1981, Virgil Scott sent Equitable a similar letter.

On March 10, 1981, Equitable wrote a letter to the Bank Commissioner, denying any wrongdoing in connection with its financing of Stritzinger's purchase of Eagle shares, a copy of which the Commissioner forwarded to Stritzinger on March 17, 1981. Similarly, on April 17, 1981, Enquitable wrote letters to Hill and Scott denying any improprieties in connection with its financing of plaintiffs' purchases of Wilmington House shares, copies of which were forwarded to the Bank Commissioner. The Bank Commissioner apparently took no further action on these matters.

At an April 15, 1982, meeting between plaintiffs and Equitable officials, the bank denied that it had done anything improper or illegal relating to its issuance of loans or letters of credit to plaintiffs.

Plaintiffs filed suit against Equitable on April 30, 1982. The Second Amended Complaint, filed January 2, 1986, alleges an assortment of claims under the federal securities laws and the common law of Maryland and Delaware. The particular federal claims alleged in relation to the Wilmington House deal include substantive violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 stemming from various omissions of material facts by the Bank, aiding and abetting violations of those provisions, conspiracy to violate those provisions, and aiding and abetting violations of § 12(2) of the Securities Act of 1933. The federal claims relating to Eagle include various affirmative misrepresentations and omissions of material fact in violation of § 10(b) and Rule 10b-5, aiding and abetting violations of 10b-5,

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[1] In February 1981, plaintiffs apparently learned that an Equitable employee involved in arranging letters of credit for plaintiffs' purchases of Wilmington House shares had left the bank in mid-1978.

conspiracy to violate 10b-5, aiding and abetting violations of § 12(2), and "controlling person" liability under § 20 of the Exchange Act and § 15 of the Securities Act. In addition, plaintiffs allege a substantive violation of RICO (§ 1062(c)) and a conspiracy to violate RICO (§ 1962 (d)) for each partnership deal, which are the subject of the current motion to dismiss.

II. DISCUSSION

Plaintiffs have alleged violations of the following provisions of RICO:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962(c), (d). Liability under § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, — US. ——, 105 S.Ct. 3275, 3285, 87 L. Ed.2d 346 (1985). In relation to both the Wilmington House and Eagle RICO counts, Equitable is the "person". The "enterprise" involved in the Wilmington House RICO counts is either the Wilmington House limited partnership or, alternatively, Equitable and all or part of a group identified as the Wilmington House defendants.[2] Equitable's "racketeering acts" making up the "pattern"

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[2] This group includes Lee P. Der, Lee P. Der, Inc., D & S Financial, Inc., Wilmington House, Lancaster Court Associates, Lancaster Associates, Inc., Stuart Bittelman, Marvin E. Greenfield, and David E. Karr.

in relation to Wilmington House include mailing of applications for letters of credit and loans to plaintiffs, issuing such loans and letters of credit to Wilmington House investors, and omitting to disclose material information, both at the November 6, 1978, meeting with Equitable vice-president Rous and subsequently.[3]

The "enterprise" involved in the Eagle RICO counts is either the Eagle limited partnership or, alternatively, Equitable and all or part of a group identified as the Eagle defendants.[4] Equitable's racketeering acts" constituting the "pattern" in relation to Eagle include making affirmative misrepresentations and omitting to disclose material information at the November 6, 1978, meeting; omitting to disclose material information acquired subsequently; and participating in the Alma "bail-out" scheme by setting the Ward lawsuit and resyndicating Alma as Eagle.

Defendant raises a multitude of arguments why the RICO counts should be dismissed, some of which pertain to all four counts, some of which pertain only to the § 1962(c) counts, and some of which pertain only to the § 1962(d) counts.

A. "Person", "Enterprise" or Both

Equitable argues in relation to all four RICO counts that plaintiffs have blurred the distinction between "person" and "enterprise", such that the Complaint neither provides Equitable with sufficient notice about the theories advanced against it nor makes clear that each theory states a cause of action. The case on which Equitable

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[3] Plaintiffs allege that Rous' representations about the soundness of Eagle constituted an implicit assurance that Wilmington House also was a sound investment, because the same principals were involved in each partnership.

[4] This includes Der, Lee P. Der, Inc., D & S Financial, Inc., Der-Mas, Inc., Eagle, Alma, Martin E. Mason, and Roger W. Ball.

relies in support of its argument, *Kredietbank N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Jan. 9, 1986) [Available on WESTLAW, DCTU database], (available on LEXIS, Genfed Library, Dist. File), is clearly distinguishable, however. The RICO count in *Kredietbank* listed three entities as "persons" and then alleged "enterprises" consisting of the same three entities, individually and in combination. Claims phrased in such a manner made it unclear whether the identical entity was alleged as both the "person" and the "enterprise", in contravention of the Third Circuit's holding in *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir.1984) (under RICO, "person" cannot be same entity as "enterprise").

In contrast, in the instant case, Equitable is the only "person" alleged. The "enterprise" is alternatively pled as either the limited partnership (Wilmington House or Eagle) or Equitable *plus* any or all of a listed group of entities. There is no possibility that Equitable alone is both the "person" and the enterprise". The Court finds that the allegations are sufficient to put Equitable on notice of the theories advanced against it and to establish that proper RICO claims are alleged in relation to both Wilmington House and Eagle.[5]

B. Pattern of Racketeering Activity

Equitable makes two arguments why the substantive RICO counts under § 1962(c) should be dismissed: (1)

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[5] Equitable apparently makes the argument, albeit in an offhand manner, that it is not liable under RICO because the facts alleged show only that it conducted its *own* affairs, not the affairs of the enterprise. *See* Letter from Defendant to Court at 6 (June 18, 1986), Docket No. 178. A person conducts the activities of an enterprise through a pattern of racketeering when "the predicate offenses are related to the activities of that enterprise," *United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 492, 74 L.Ed.2d 634 (1982). The acts allegedly committed by Equitable obviously were related to the activities of the enterprise, so a sufficient nexus exists to allow a RICO claim.

although the enterprise committed racketeering acts, Equitable's acts relating to the enterprise were not racketering acts, these acts did not constitute a "pattern of racketeering activity."

In relation to defendant's first argument, the Court notes that § 1962(c), on its face, requires only that the defendant "participate, directly or indirectly", in the conduct of the enterprise's affairs. Numerous courts have held that indirect or peripheral involvement in the affairs of the enterprise, such as that alleged against Equitable, is sufficient to establish a claim under RICO. *See, e.g., Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir.1986); *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir.1977).[6]

Equitable's argument also may be interpreted as asserting that, as a matter of law, the acts it committed were not racketeering acts. Whether the activities in which Equitable engaged—such as issuing letters of credit or participating in a sales meeting—are racketeering or innocent acts depends on the context in which they were committed. Such questions of fact may not be addressed on a motion to dismiss. *See Bank of America*, 782 F.2d at 970.

Equitable argues next that, assuming it committed racketeering acts those acts do not form a "pattern" of racketeering activity. The RICO statute defines "pattern of racketeering activity" as requiring at least two acts of racketeering activity committed within ten years of each other. In light of dicta in the U.S. Supreme Court decision in *Sedima, S.P.R.L. v. Imrex Co.*, — U.S. ——, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985), numerous courts, including this one, have held that a "pattern" exists only where the predicate racketeering acts are related to each other and suggest continuous, rather than

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[6] Indeed, plaintiffs' allegations, if true, suggest that Equitable may have participated directly in the affairs of the enterprise involved in the Eagle deal.

isolated wrongdoing *See, e.g., Paul S. Mullin & Associates, Inc. v. Bassett*, 632 F.Supp. 532, 541 (D.Del. 1986); *Allington v. Carpenter*, 619 F.Supp. 474, 478 (C.D.Cal. 1985); *Kredietbank, N.Y. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Jan. 9, 1986) (available on LEXIS, Genfed Library, Dist. File).

A current subject of debate in this area is whether the "continuity" aspect of a "pattern" requires that the racketeering acts occur in several criminal schemes, rather than a single scheme. *Compare, e.g., Fleet Mgmt. Systems, Inc. v. Archer-Daniels-Midland Co.*, 627 F.Supp. 550 (C.D.Ill.986) (multiple schemes required); *Medallion TV Enterprises, Inc. v. SelecTV of California*, 627 F.Supp. 1290 (C.D.Cal.1986) (same); *with Trak Microcomputer Corp. v. Wearne Bros.*, 628 F.Supp. 1089 (N.D. Ill.1985) (pattern can exist in relation to one criminal scheme); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir.1986) (same). In *Mullin*, this Court adopted a flexible approach to the "pattern" concept, finding that "criminal acts of a sufficient number and variety, [committed] over a sufficient period of time, ... should be enough to create a 'pattern'," even where only one overall criminal scheme is involved. 632 F.Supp. at 541. Other courts also have adopted such a flexible approach. *See, e.g., Graham v. Slaughter*, 624 F.Supp. 222 (N.D.Ill. 1985); *Temporaries, Inc. v. Maryland Nat'l. Bank*, 638 F.Supp. 118 (D.Md.1986). Equitable therefore cannot argue successfully that a "pattern" does not exist merely because only one criminal scheme (the fraudulent offer and sale of securities) existed in relation to each limited partnership.

The Court instead must assess the activities comprising each alleged "pattern" to determine if they show sufficient continuity to satisfy the statute.[7] Plaintiffs

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[7] Regarding each limited partnership, the activities comprising the "pattern" obviously are related to each other. The Court thus need consider only the continuity of the alleged predicate acts.

rely on the following acts to establish a pattern in relation to the Wilmington House deal: Equitable's mailing of applications for letters of credit to plaintiffs and issuance of such letters of credit in December 1977, which aided and abetted the fraud; the omissions of material facts which occurred at the November 6, 1978, meeting conducted by an Equitable officer; and Equitable's subsequent failure to disclose material information—in particular, the SEC order issued against Der in July 1979. The Court finds that these acts were of a sufficient number and variety and occurred over a sufficient period of time to constittue a "pattern".

Plaintiffs rely on the following acts to establish a "pattern" in relation to the Eagle deal: Equitable's participation in the illegal conspiracy to bail out Alma by settling the Ward lawsuit and resyndicating Alma as Eagle; the material misrepresentations and omissions of material facts which occurred at the November 6, 1978, meeting conducted by an Equitable officer, and Equitable's subsequent failure to disclose material information about the July 1979 SEC order ,among other things. The Court finds that these acts also were sufficiently numerous, different, and separated in time to comprise a "pattern".

One other factor counsels in favor of finding that each scheme had a sufficient imprimatur of continuity and open-endedness to constitute a pattern. Equitable allegedly has attempted to cover up its role in any illegal activity by denying to plaintiffs and the Maryland Bank Commissioner that it has done anything wrong in relation to either partnership. Such a cover-up, if true would show that Equitable's wrong-doing has continued long after plaintiffs purchased their partnership shares.

In summary, plaintiffs adequately have alleged that Equitable engaged in a "pattern of racketeering activity" in relation to both Wilmington House and Eagle to state claims under § 1962(c).

C. Conspiracy to Violate RICO

Equitable also makes two arguments why the two RICO conspiracy counts should be dismissed: (1) plaintiffs fail to alleged that Equitable agreed with anyone to do anything in furtherance of the conspiracy to violate RICO; and (2) plaintiffs alleged only a conspiracy to commit the predicate acts, not a conspiracy to violate RICO.

In arguing that a valid chain under § 1962(d) requires an allegation that the defendant agreed to commit two or more predicate acts, Equitable relies on two circuit court decisions, *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied, Rabito v. U.S.*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); and *United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.8d 344 (1978). These decisions are simply beside the point for this Court, however, because the Third Circuit has ruled that a defendant need not agree to commit personally two or more predicate acts. *See United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, — U.S. ——, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985).

Regarding Equitable's second argument, relevant Third Circuit decisions make clear that a RICO conspiracy is something different from an agreement merely to commit the predicate offenses. *See Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 792 n. 8 (3d Cir.1984) (§ 1962(d) prohibits conspiracies knowingly to further affairs of the enterprise), *cert. denied*, — U.S. ——, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985); *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir.) (RICO prohibits agreement to conduct activities of enterprise through commission of predicate offenses), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983).

Weighing plaintiffs' RICO conspiracy allegations against the Third Circuit standard, the Court finds that

the Eagle conspiracy allegation measures up, while the Wilmington House conspiracy allegation does not. Paragraph 176 of the Second Amended Complaint, relating to Eagle, states:

> Equitable's schemes, conspiracies and other unlawful activities and conduct . . . constitute a conspiracy with the Eagle defendants to violate 18 U.S.C. § 1962(c) in the fraudulent offer and sale of securities. . . . In furtherance of this combination and conspiracy, Equitable and its co-conspirators maliciously did those things which they combined and conspired to do, including [the acts constituting the pattern of racketeering activity].

This allegation, through its reference to § 1962(c), gives Equitable adequate notice of plaintiffs' claim that it conspired to conduct the activities of the enterprise through the listed racketeering acts.

In contrast, the analogous paragraph in the Wilmington House count states:

> Equitable, by virtue of its financial relationship with the Wilmington House defendants and with Wilmington House Associates Limited Partnership, . . . as well as [. . . other racketeering acts], conspired with the Wilmington House defendants and others to participate directly and indirectly in the fraudulent offer and sale of securities of Wilmington House Associates to the plaintiffs and others.

Second Amended Complaint ¶ 190. This allegation gives Equitable notice only of its participation in a conspiracy to sell securities fraudulently and does not pass muster under *Seville* and *Riccobene*. Accordingly, the Wilmington House RICO conspiracy count must be dismissed.

III. CONCLUSION

For all the foregoing reasons, Defendant's Motion to Dismiss Counts 21, 22, and 23 of the Second Amended Complaint is denied. Defendant's Motion to Dismiss Count 24 is granted. An Order will enter in conformity with this Opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
D. DELAWARE

Civ. A. No. 82-220 CMW.

JOHN T. HILL, *et al.*,
Plaintiffs,

v.

EQUITABLE BANK, N.A.,
Defendant.

Dec. 20, 1985

OPINION

CALEB M. WRIGHT, Senior District Judge.

This litigation stems from an alleged scheme to defraud plaintiffs in relation to the sale of interests in two limited partnerships. Plaintiffs, investors in the partnerships, originally asserted claims against the defendant, Equitable Bank, N.A., under the Securities Act of 1933, the Securities Exchange Act of 1934, and the common law of Maryland and Delaware. Plaintiffs [1] now seek to amend their complaint to assert an additional claim against defendant under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961. Defendant vigorously opposes this amendment.

The Court has chronicled the substantive facts giving rise to this litigation in two lengthy opinions, *see* 562 F.Supp. 1324 (D.Del. 1983), and 599 F.Supp. 1062 (D. Del. 1984), and will not repeat them here. It is neces-

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[1] The motion to amend was filed by counsel for all plaintiffs except James R. Stritzinger, who is proceeding *pro se*. For the sake of convenience, the Court will refer to the moving parties simply as "plaintiffs."

sary, however, to provide a procedural précis of this dispute to put plaintiffs' petition in the proper perspective.

I. *Procedural History*

Plaintiffs John T. Hill, Patricia and Thomas L. Ruger, Virgil and Marie Scott, James R. Stritzinger, Descomp, Inc., and Data Controls North, Inc., filed this action on April 30, 1982, alleging violations of federal securities law and Maryland and Delaware state law by Equitable Trust Co. (the predecessor in interest of Equitable Bank, N.A.) and Mercantile Safe Deposit & Trust Co. After considerable discovery and briefing of motions, on May 3, 1983, the Court dismissed portions of the complaint and gave plaintiffs thirty days to conduct additional discovery and to file an amended complaint. *See* 562 F.Supp. 1324 (D.Del. 1983). This deadline was extended several times, and plaintiffs filed an amended complaint against Equitable on October 7, 1983.[2] This amended complaint contained allegations similar to those found in plaintiffs' original complaint. The parties conducted additional discovery, and Equitable again moved to dismiss the complaint. The Court granted this motion in part on August 16, 1984. *See* 599 F.Supp. 1062 (D.Del. 1984).

In the meantime, Equitable had filed a number of lawsuits in federal court in Maryland against various plaintiffs, seeking recovery under certain letter of credit agreements. Equitable's suits against plaintiffs Virgil and Marie S. Scott, John T. Hill, Thomas L. and Patricia Ruger, and Descomp, Inc., were transferred to the District of Delaware on September 20, 1984, and consolidated with the original *Hill* case, C.A. No. 82-220, on March 26, 1985. *See* Order of March 26, 1985, Docket No. 82. A similar lawsuit by Equitable against plaintiff James R. Stritzinger was transferred from Maryland to

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[2] The action against Mercantile Safe Deposit & Trust Co. was settled in August, 1983. *See* Order and Stipulation of Dismissal, Docket No. 59.

the District of Delaware on March 29, 1985, and consolidated with the original *Hill* case on May 2, 1985. *See* Order of May 2, 1985, Docket No. 85. Unlike the other cases transferred from Maryland, *Equitable Trust Co. v. Stritzinger*, C.A. 85-216, contains a counterclaim by Stritzinger against Equitable alleging a violation of RICO, 18 U.S.C. § 1961. *See* Amended Counterclaim and Demand for Jury Trial ¶¶ 170-177, Docket No. 11. The Maryland court never ruled on a motion by Equitable to dismiss the RICO counterclaim which was filed and briefed prior to the transfer of the case to Delaware. *See* Letter from the Hon. Joseph H. Young to the Hon. Caleb M. Wright (March 29, 1985). The RICO counterclaim is still at issue in the litigation.

In an Order dated March 28, 1985, this Court set June 14, 1985, as the cut-off date for any motions to join additional parties or amend the pleadings. *See* Order of March 28, 1985, Docket No. 84. After receiving estimates from counsel about the anticipated length of trial, the Court scheduled a three-week trial to start January 6, 1986. *See* Order of June 27, 1985, Docket No. 97. Discovery was to be completed by September 30, 1985. *See* Order Extending Discovery and Motions Date Deadline, Docket No. 131.

Plaintiffs filed their motion to amend on September 10, 1985.[3] After briefing on the motion was complete but prior to oral argument, defendant's counsel Michael D. Colglazier requested a conference with the Court and opposing counsel. At this conference, held October 10, 1985, Colglazier asked for additional time to complete discovery, a request with which plaintiffs' counsel agreed. Colglazier also stated that Equitable planned to file a

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[3] The parties' briefs on the motion to amend state that the motion was filed on or about August 7, 1985. However, the motion was not docketed until September 10, 1985. *See* Motion for Leave to Amend Complaint, Docket No. 125.

comprehensive motion for summary judgment upon completion of discovery. The Court agreed to extend the discovery cut-off date until January 31, 1986, and cancelled the scheduled pretrial conference and trial. *See* Order of October 11, 1985, Docket No. 141. No new dates have been set for the pretrial conference and trial.

II. *The Parties' Positions*

Plaintiffs now seek to add a new count to their complaint alleging violations of 18 U.S.C. § 1962. Plaintiffs present four points in support of their motion for leave to amend. First, the Court should grant motions to amend freely as justice requires. Second, justice requires that this motion be granted because the availability of a private RICO cause of action in these circumstances was made clear only after the U.S. Supreme Court decision in *Sedima, S.P.R.L. v. Imrex Co.*, —— U.S. ——, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), issued after the deadline to file motions to amend in this case. Third, plaintiffs assert that defendant will not be prejudiced by the amendment because it already had been put on notice of the facts comprising the RICO claim. In particular, the predicate offenses needed to support a RICO claim were alleged in the existing complaint, and a RICO claim already was present in the case through the Stritzinger counterclaim. Finally, plaintiffs argue that they will suffer great prejudice if their motion is denied.

In rseponse, Equitable makes three arguments. First, it argues that filing a motion to amend three years after the case was brought originally constitutes undue delay, especially since no adverse precedent prevented plaintiffs from seeking the RICO amendment much earlier. Second, Equitable argues that the facts on which plaintiffs base their RICO claim have been known to them for several years. Finally, Equitable argues that it will be prejudiced unduly if plaintiffs are allowed to amend. The particular types of prejudice claimed by Equitable in-

clude the necessity of facing a novel legal claim close to trial, the great increase in its potential liability because of RICO's provisions for treble damages and attorneys' fees, the tactical advantage conferred on plaintiffs, and the possibility that the RICO count would require Equitable to file a motion to dismiss and conduct additional discovery.

Having considered the parties' arguments and the relevant authorities, the Court will grant plaintiffs' motion for leave to amend their complaint.

III. *Discussion*

Leave to amend pleadings under Fed. R. Civ. P. 15(a) is at the discretion of the district court, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Courts "have shown a strong liberality . . . in allowing amendments under Rule 15(a)." *Heyl & Patterson Intern. v. F.D. Rich Housing*, 663 F.2d 419, 425 (3d Cir. 1981), (quoting 3 Moore's Federal Practice ¶ 15.08(2)), *cert. denied*, 455 U.S. 108, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982). In *Foman*, the Supreme Court identified a number of factors governing motions to amend under Rule 15(a):

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of

> amendment, etc.—the leave sought should, as the rules require, be "freely given."

371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *accord*, *Heyl & Patterson Intern.*, 663 F.2d at 425; *Cornell & Co. v. Occupational Safety and Health Rev. Comm'n.*, 573 F.2d 820, 823 (3d Cir. 1978).

The Third Circuit has interpreted these factors to emphasize that "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell & Co.*, 573 F.2d at 823; *Heyl & Patterson Intern.*, 663 F.2d at 425. A party's delay in moving to amend a pleading generally is an insufficient ground to deny an amendment, unless that delay unduly prejudices an opposing party. *Cornell & Co.*, 573 F.2d at 823; *Butcher & Singer, Inc. v. Kellam*, 105 F.R.D. 450, 452 (D. Del. 1984). *See also* 3 Moore's Federal Practice ¶ 15.08[4], at 15-76 (2d ed. 1985) ("[W]hile laches and unexcused delay may bar a proposed amendment, delay alone, regardless of its length, is not enough to bar it if the other party is not prejudiced."). In addition, the non-moving party must do more than simply claim prejudice; it must show that it will be unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it otherwise could have offered had the amendment been timely. *See Heyl & Patterson Intern.*, 663 F.2d at 426. Where substantial prejudice is not proven, a court may deny leave to amend only where the non-moving party shows bad faith, dilatory motive, truly undue or unexplained delay, futility, or repeated failure to cure deficiencies by amendment. *Id.* at 426.

In accordance with these principles, the Court first must consider the extent to which granting plaintiffs' motion will prejudice Equitable. As discussed above, Equitable claims several ways in which it will be prejudiced: the proxmity of trial, the great increase in its potential liability, the tactical advantage conferred on plaintiffs, and the necessity of filing a motion to dismiss

and additional discovery requests. The Court finds none of these arguments persuasive.

Equitable's most compelling argument is that plaintiffs' motion was filed only four months before the scheduled trial date and less than a month before the discovery cut-off date. *Cf., e.g., Cornell & Co.*, 573 F.2d 820 (3d Cir. 1978) (administrative board abused its discretion in allowing amendment of complaint which changed legal and factual basis for alleged violation nine days before hearing); *Gordon v. Terry*, 684 F.2d 736 (11th Cir. 1982) (district court properly denied amendment adding RICO claims filed day before scheduled summary judgment hearing), *cert. denied*, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983). The subsequent indefinite postponement of the trial and extension of the discovery period have vitiated considerably the force of this argument, because defendant now has time to complete any additional preparation.

Indeed, it is unclear that Equitable will have to undertake substantial additional work to meet plaintiffs' RICO claim. The RICO allegations are based on the same facts as the existing claims. RICO is not a new issue in the litigation, given the RICO counterclaim present in the *Stritzinger* case transferred from Maryland and consolidated with the instant case. Equitable presumably has been on notice all along to defend against that claim.

Equitable's claim of prejudice based on its need to move for summary judgment and conduct additional discovery similarly must fail. There are no pressing time constraints now that the trial has been postponed. Moreover, in moving to dismiss plaintiffs' RICO count, Equitable can draw on the research used to prepare the briefs seeking to dismiss the RICO counterclaim filed in the *Stritzinger* case. Regarding discovery, Equitable's counsel acknowledged at oral argument that he did not expect that substantial new discovery would be required if the RICO count were added.

Equitable simply cannot claim prejudice based on its increased exposure to liability if RICO claims are part of the case. First, a RICO claim already is present in the case through the *Stritzinger* counterclaim, so that Equitable already faces potential liability for treble damages and attorneys' fees. In addition, the mere fact that the defendant may be held liable as a result of an amendment should not prevent the Court from granting an amendment that otherwise is valid. *See Chamberlin v. United Engineers & Constructors*, 194 F. Supp. 647, 649 (E.D. Pa. 1961); *cf. Thomas v. Medesco, Inc.*, 67 F.R.D. 129 (E.D. Pa. 1974) (allowing amendment which added claim for punitive damages); 3 Moore's Federal Practice ¶ 15.08[2], at 15-52-15-54 (2d ed. 1985).

Equitable's argument that it will be prejudiced through some tactical advantage plaintiffs will gain if the amendment is granted is simply beside the point. Equitable would gain a similar advantage if plaintiffs' motion were denied. Practically any decision by a court in the progress of litigation conveys a tactical advantage on one side and presumably prejudices the other. This fact does not prevent the court from making decisions; it is the normal state of affairs.[4]

Given that Equitable has failed to convince the Court that it will be substantially prejudiced by the proposed amendment, the Court must consider other factors which might allow the amendment to be denied. Equitable does not suggest that plaintiffs' motion is a futile gesture or stems from bad faith or dilatory motive. Equitable,

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[4] *Komie v. Buehler Corp.*, 449 F.2d 644 (9th Cir. 1971), the only case cited by defendant in its discussion of the prejudice issue, is readily distinguishable. In *Komie*, the defendants sought to amend their answer and pretrial order a month before trial in order to deny material facts which they had previously admitted. In this case, on the other hand, the trial date is not yet on the horizon, and plaintiffs are basing the RICO count on the same facts as their original claims.

however, does claim that plaintiffs delayed unduly in seeking amendment. It points out that plaintiffs could have filed their amendment years before they actually did, because the proposed RICO count is not based on hitherto unknown facts or legal theories.

Plaintiffs seek to justify this delay by arguing that the law on civil RICO was unclear until the Supreme Court handed down its decision in *Sedima, S.P.R.L. v. Imrex Co.*, —— U.S. ——, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).[5] This proffered justification is not particularly convincing. Certainly, courts in the Third Circuit and elsewhere had reached vastly different conclusions about the circumstances in which RICO was available to civil litigants. *Compare, e.g., Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984) (limiting reach of civil RICO by requiring criminal conviction for predicate acts and proof of "racketeering injury" beyond predicate acts), *rev'd.*, —— U.S. ——, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); *Penturelli v. Spector Cohen Gadon & Rosen P.C.*, 603 F. Supp. 262 (E.D. Pa. 1985) (same); *with Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984) (rejecting "racketering injury" requirement), *aff'd*, —— U.S. ——, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985); *Roche v. E.F. Hutton & Co.*, 603 F. Supp. 1411 (M.D. Pa. 1984) (same). *See also Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1497-98 (D. Del. 1984) (discussing conflicting decisions); T. Hazen, The Law of Securities Regulation § 19.3, at 648-51 (1985) (same). No decision binding on a district court in Delaware existed, however, to pre-

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[5] Plaintiffs also assert that the only period of delay to be considered is the time between June 14, 1985—the cut-off date for filing amendments to the pleadings—and the date the motion to amend was filed, because plaintiffs could have filed any amendment prior to June 14, 1985, without leave of the Court. This assertion is incorrect. The Court would have had to approve any motion to amend, regardless of whether it was filed before the cut-off date.

clude plaintiffs from asserting a RICO claim previously. Many other litigants, including plaintiff-counterclaimant Stritzinger, did not feel similarly inhibited and took the gamble of asserting RICO claims.

Nevertheless, the Court cannot conclude that plaintiffs delayed unduly in seeking amendment. Because Equitable has failed to show significant prejudice, plaintiffs will be allowed, despite delay, to amend their complaint to assert a RICO claim against Equitable. An Order will enter in accordance with this Opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
D. DELAWARE

Civ. A. No. 82-220 CMW

JOHN T. HILL, *et al.*,
Plaintiff,

v.

EQUITABLE BANK, NATIONAL ASSOCIATION,
Defendant.

Aug. 16, 1984

OPINION

CALEB M. WRIGHT, Senior District Judge.

This case arises out of an alleged scheme to defraud plaintiffs in connection with the sale to plaintiffs of interests in two limited partnerships. In a related action, *Hill v. Der*, C.A. No. 80-146 (D. Del., filed April 1, 1980), plaintiffs have brought suit against various parties involved in these, and other, transactions. In this action, plaintiffs have brought suit against Equitable Bank, N.A.[1] (hereinafter "Equitable"), based upon the bank's alleged participation in the fraud.[2] Plaintiffs

[1] Equitable Bank, N.A. is the successor in interest to the Equitable Trust Co., the original named defendant in this action. Subsequent to the filing of this suit, The Equitable Trust Company became a national banking association.

[2] Plaintiffs originally brought suit against Equitable and Mercantile Safe Deposit & Trust Co. (hereinafter "Mercantile"). However,

claim that Equitable has violated various anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as various duties under state law.

Presently before the Court is defendant's motion to dismiss. Defendant contends that: (a) plaintiffs' federal securities law claims are barred by applicable statutes of limitations; (b) plaintiffs' allegations, on their merits, fail to state a claim upon which relief may be granted under the federal securities laws; (c) plaintiffs have failed to plead their claims with the degree of particularity required by Fed. R. Civ. P. 9(b); and (d) plaintiffs' state law claims must be dismissed along with plaintiffs' federal securities law claims on grounds of lack of pendant jurisdiction.[3] As discussed herein, the Court grants defendant's motion in part.

BACKGROUND

On November 11, 1977, plaintiff John T. Hill, Thomas and Patricia Ruger, Virgil and Marie Scott, and Descomp, Inc., a corporation controlled and managed by Messrs. Ruger and Scott, entered into subscription agreements to purchase shares of Wilmington House Associates (hereinafter "Wilmington House"), a limited partnership formed for the purpose of acquiring and operating an apartment complex in Wilmington, Delaware. The sale of Wilmington House shares to plaintiffs was principally orchestrated by Lee P. Der. Through a wholly owned company, Lee P. Der, Inc., Der served as general partner of Wilmington House.

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plaintiffs subsequently settled and dismissed their claims against Mercantile.

[3] Defendant also contends that plaintiffs seek damages that are not allowable under the federal securities laws. However, at oral argument on the motion to dismiss, the Court ruled that it would defer consideration of the damages issues, without prejudice to defendant's right to raise the issues at a later point in this litigation when the claims as to liability are more clearly established.

Plaintiffs paid for their Wilmington House shares by means of a down payment on November 11, 1977 and subsequent installment payments on May 1, 1978, February 1, 1979, February 1, 1980, and February 1, 1981. The installment payments were financed through letters of credit issued by defendant Equitable.

On November 2, 1978, plaintiffs Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc., a corporation controlled and managed by Ruger and Scott, entered into subscription agreements to purchase shares of another limited partnership, Eagle Associates (hereinafter "Eagle"). Plaintiff James Stritzinger entered into a similar subscription agreement on November 30, 1978. Eagle was formed as a resyndication of a predecessor limited partnership, Alma Coal Properties, Ltd. (hereinafter "Alma"), and engaged in the business of mining and selling coal, and leasing coal lands, in West Virginia. As with the sale of Wilmington House shares, the sale of Eagle shares to plaintiffs was principally orchestrated by Lee P. Der. Through Der-Mas, Inc., a corporation controlled by Der, Der served as general partner of Eagle.

James Stritzinger paid for Eagle shares by means of a down payment on December 18, 1978 and subsequent installment payment on June 1, 1979, and June 1, 1980. Stritzinger financed his down payment with a loan from Equitable and financed his installment payments with letters of credit issued by Equitable.

Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc. paid for their Eagle shares by means of a down payment on December 15, 1978 and subsequent installment payments on June 1, 1979 and June 1, 1980. Equitable declined to issue letters of credit to finance plaintiffs' installment payments.[4] As a result, between

[4] Original co-defendant Mercantile made loans to finance plaintiffs' down payments on their Eagle shares. However, after officers

January and March of 1979, Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc., issued loans to Eagle to secure payment of the balance due on the purchase price of their shares. These loans were then applied as a set-off against the balance due on the purchase price of the shares when the installment payments subsequently came due.[5]

Shortly after plaintiffs purchased shares of Wilmington House and Eagle, "storm warnings" began to appear, indicating that the investments were not as sound as they had first appeared. In January, 1979, Wilmington House's principal asset, Lancaster Court Associates, filed a petition for bankruptcy. In May, 1979, plaintiffs received their Wilmington House tax returns, revealing heavy operating losses by the partnership. Furthermore,

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of the bank allegedly discovered improprieties in connection with the financing of the transactions, Mercantile rejected plaintiffs' applications for letters of credit to finance plaintiffs' installment payments on their shares.

[5] Throughout this litigation there has been substantial confusion regarding when payments were made by plaintiffs on both their Wilmington House and Eagle shares. Plaintiffs' original complaint alleged that payments were made on the Wilmington House shares up to and including the February 1, 1980 installment payments. In addition, the complaint alleged that James Stritzinger made full payment for his Eagle shares by June 1, 1979 and that Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc. made full payment for their Eagle shares on an accelerated basis by March, 1979. However, plaintiffs amended complaint alleges that full payment was made on the Wilmington House shares and that all payments on both the Wilmington House and Eagle shares were made on the scheduled installment dates. At oral argument on the present motion to dismiss, plaintiffs' counsel explained that Thomas Ruger's, Virgil and Marie Scott's, and Data Controls North, Inc.'s January through March, 1979 "payments" on their Eagle shares were in fact loans issued to the partnership to secure their subsequent installment payments on their shares. For purposes of the motion to dismiss, the Court must accept plaintiffs' allegations as true and the Court may not pierce the purported loans to examine the substance of the transactions.

in the latter months of 1979 and early months of 1980, Der informed plaintiffs that a declining demand for coal would require a restructuring of Eagle's operations and necessitate substantial, unanticipated capital outlays.

On April 1, 1980, plaintiffs filed suit against Der, the partnerships, and others involved in the sale of partnership interests to plaintiffs. *Hill v. Der*, C.A. No. 80-146 (D.Del., filed April 1, 1980). Plaintiff's allege, *inter alia*, that they were fraudulently induced to purchase shares of Wilmington House and Eagle through various misrepresentations concerning the soundness of the investments.

On February 20, 1981, James Stritzinger wrote a letter to the Maryland State Bank Commissioner inquiring about potential improprieties regarding Equitable's relationship with Der[6] and Equitable's financing of Stritzinger's purchase of Eagle shares. The Bank Commissioner forwarded Stritzinger's letter to Equitable with a request for an explanation. On March 9, 1981, John T. Hill wrote a letter to Equitable and on March 13, 1981, Virgil Scott wrote a letter to Equitable, inquiring about similar improprieties in connection with Equitable's financing of plaintiffs' purchases of Wilmington Associates shares. They inquired further whether any employees had been terminated by Equitable as a result of such improprieties.[7]

On March 10, 1981, Equitable wrote a letter to the Bank Commissioner, denying any wrongdoing in connection with its financing of Stritzinger's purchases of

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[6] Apparently, plaintiffs' applications for loans and letters of credit to finance their purchases of Wilmington House and Eagle shares were handled through Der and F & S Financial, Inc., a broker-dealer controlled by Der.

[7] In February, 1981, Virgil Scott and Thomas Ruger apparently learned that a bank employee involved in arranging letters of credit for plaintiffs' purchases of Wilmington House shares had left the bank in mid-1978.

Eagle shares, a copy of which was forwarded by the Bank Commissioner to Stritzinger on March 17, 1981. Similarly, on April 27, 1981, Equitable wrote letters to Hill and Scott, denying any improprieties in connection with its financing of plaintiffs' purchases of Wilmington House shares, copies of which were forwarded to the Bank Commissioner. The Bank Commissioner apparently took no further action on this matter.

On March 20, 1982, Thomas Ruger unexpectedly received a phone call from Martin E. Mason, a 40% shareholder of Der-Mas, Inc., a general partner of Eagle. Mason informed Ruger that Stephen Maszaros, a Vice President of Equitable, and other employees of the bank, had received kickbacks in return for arranging the financing for plaintiffs' purchases of Wilmington House shares.

On April 30, 1982, plaintiffs filed suit against Equitable based upon the alleged kickbacks. Plaintiffs claimed that Equitable violated the federal securities laws by failing to disclose the kickbacks and by otherwise aiding and abetting, and conspiring in, a scheme to defraud plaintiffs in connection with their purchases of Wilmington House and Eagle shares.

On September 15, 1982, Equitable filed a motion to dismiss on the grounds that plaintiffs' federal securities law claims are time-barred and fail to state valid claims under the securities law. In considering Equitable's motion, the Court found plaintiff's claims to be conclusory, incomplete, and otherwise wholly inadequate under the specificity requirements of F.R.C.P. 9(b). Nevertheless, the Court found that plaintiffs' allegations raised sufficient questions of fact to prevent the Court from ruling upon Equitable's statute of limitations defense as a matter of law. Furthermore, in their briefs and at oral argument, plaintiffs set forth additional allegations to supplement the merits of their claims. Therefore the Court denied Equitable's motion in substantial part.

The Court granted plaintiffs leave to conduct additional discovery to flesh out their claims and ordered plaintiffs to file an amended complaint setting forth their claims with specificity and detail. When the amended complaint was filed, Equitable would be permitted to renew its motion to dismiss. *Hill v. Equitable Trust Co.*, 562 F.Supp. 1324 (D.Del.1983).

On October 7, 1983, plaintiffs filed an amended complaint. The Wilmington House claims set forth in the amended complaint are substantially similar to those set forth in the original complaint. Plaintiff's claims are primarily grounded in the alleged kickbacks received by employees of Equitable in return for arranging the financing for plaintiffs' purchases of Wilmington House shares. Plaintiffs claim that Equitable violated the federal securities laws by failing to disclose the kickbacks to plaintiffs and by otherwise aiding and abetting and conspiring with Der and others in a scheme to defraud plaintiffs in connection with their purchases of Wilmington House shares.

Plaintiffs have also set forth an additional allegation against Equitable not alleged in their original complaint, pertaining to their purchases of Wilmington House shares.[8] On November 6, 1978, Der set up a meeting with some of the plaintiffs to discuss, *inter alia*, financing for plaintiffs' purchases of Eagle shares. Plaintiffs allege that at the meeting, R. Kenneth Rous, a Vice President of Equitable, made certain misrepresentations concerning Eagle, including the misrepresentation that Eagle was a sound investment. Plaintiffs claim that this misrepresentation constituted an implicit misrepresentation that Der and other principals behind Eagle were honest

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[8] Plaintiffs claim to have set forth this allegation in their amended complaint. However, while the amended complaint can be liberally construed to incorporate the allegation, it was explicitly set forth by plaintiffs for the first time in their brief in opposition to Equitable's renewed motion to dismiss.

and law-abiding, which in turn constituted an implicit misrepresentation that the same principals behind Wilmington House were honest and law abiding.

The Eagle claims set forth in the amended complaint differ substantially from those set forth in the original complaint related to Equitable's failure to disclose the alleged kickbacks received by employees of Equitable in connection with Equitable's financing of plaintiffs' purchases of Wilmington House shares.[9] In contrast, the Eagle claims in the amended complaint primarily relate to an alleged fraudulent scheme underlying the resyndication of the Eagle partnership and the sale of partnership shares to plaintiffs.

Apparently, in August of 1978, Ward Development Co. (hereinafter "Ward"), the sole limited partner of

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[9] In the original complaint, only James Stritzinger asserted claims against Equitable, alleging primary liability under the federal securities laws for fraud in connection with the sale of Eagle shares. This was apparently due to the fact that only Stritzinger received financing from Equitable for the purchase of Eagle shares. Evidently, the legal theory underlying plaintiffs' original complaint was that Equitable owed a duty under the federal securities laws to disclose material information to plaintiffs in connection with their purchases of Wilmington House and Eagle shares, based upon its role in financing the transactions. Other purchasers of Eagle shares, Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc. asserted claims against original co-defendant Mercantile, alleging primary liability under the federal securities laws for fraud in connection with their purchases of the partnership shares. These plaintiffs claimed that employees of Mercantile received kickbacks from Der or others in return for arranging the financing for plaintiffs' purchases of Eagle shares, but that Mercantile rejected plaintiffs' applications for letters of credit when the bank discovered the improprieties, yet the bank fraudulently failed to disclose the kickbacks to plaintiffs. It must be noted, however, that all purchasers of Eagle shares asserted claims against Equitable in the original complaint for secondary liability under the federal securities laws, alleging that Equitable aided and abetted and conspired with Mercantile, Der, and others in a scheme to defraud plaintiffs in connection with their purchasesr of Eagle shares

Alma, the predecessor of the Eagle partnership, brought suit against Der, the partnership and others, claiming various breaches of the partnership agreement. On August 31, 1978, Ward obtained a temporary injunction prohibiting Equitable from making payments on letters of credit issued to Ward to finance its purchases of Alma shares. Plaintiffs' contend that Ward's lawsuit and the possibility of Ward's withdrawal from Alma threatened to financially cripple the partnership and created a substantial risk that Alma would default on loans by Equitable to the partnership. Plaintifs allege that Equitable, therefore, entered into a fradulent scheme with Der and others to conceal the lawsuit and resyndicate Alma as Eagle, issuing shares of the new partnership to plaintiffs in order to financially "bail out" the partnership and bail out Equitable's loans to the partnership.

Plaintiffs allege that pursuant to this scheme, Equitable's Vice President, R. Kenneth Rous, made certain misrepresentations at the November 6, 1978 meeting, discussed above. Specifically, plaintiffs allege that Rous misrepresented that Eagle was a sound investment, that Equitable had no self-interest in the sale of partnership shares to plaintiffs, that Equitable expected to make substantial equipment loans to the partnership and that Eagle's Private Placement Memorandum was accurate when, in fact, the Memorandum simply stated that "Alma's sole limited partner . . . decided to withdraw from the operational side of the coal business."

Plaintiffs claim that Equitable committed fraud under the federal securities laws by making the aforementioned misrepresentations at the November 6, 1978 meeting. In addition, plaintiffs claim that Equitable is liable under the federal securities laws as an aider and abettor or conspirator in the alleged fraudulent bail out scheme. Finally, plaintiffs claim that Equitable is liable under federal securities laws as a controlling person behind the bail-out scheme, due to the financial leverage it pos-

sessed over the Alma/Eagle partnership as a result of its substantial outstanding loans to the partnership.

On November 7, 1983, Equitable renewed its motion to dismiss. It is this motion that is presently before the Court.

STATUTE OF LIMITATIONS

1. *Relation Back of Amended Complaint*

A threshold issue raised by Equitable's statute of limitations defense is whether the filing of plaintiffs' amended complaint relates back to the filing of plaintiffs' original complaint for purposes of determining the timeliness of plaintiffs' claims. Equitable does not dispute that the Wilmington House claims in the amended complaint relate back to the Wilmington House claims in the original complaint. Nor does Equitable dispute that James Stritzinger's Eagle claims in the amended complaint relate back to Stritzinger's Eagle claims in the original complaint. However, Equitable does contend that the Eagle claims of Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc. in the amended complaint do not relate back to the original complaint.

Fed.R.Civ.P. 15(c) provides in relevant part that "[w]henever the claim or defense asserted in the amended pleading arose out of the *conduct, transaction, or occurrence* set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." (emphasis added). The most important factor in determining whether the filing of an amended pleading relates back to the filing of a prior pleading is whether the prior pleading gave the opposing party adequate notice of the "conduct, transaction or occurrence" out of which the claims or defenses asserted in the amended pleading arise. 3 J. Moore, *Moores' Federal Practice* ¶ 15.15[3] at 15-194 (2d ed. 1984).

Equitable's contention that the Eagle claims of Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc. in the amended complaint do not relate back to the original complaint is based upon the fact that, in the original complaint, only James Stritzinger asserted claims against Equitable alleging primary liability for fraud in connection with the sale of Eagle shares.[10] However, Ruger, the Scotts and Data Controls North, Inc. did assert claims against Equitable in the original complaint for secondary liability under the federal securities laws, alleging that Equitable aided and abetted and conspired with Der and others in a scheme to defraud plaintiffs in connection with their purchases of Eagle shares.

Equitable, therefore, was given adequate notice in the original complaint of the "conduct, transaction, or occurrence" underlying the Eagle claims asserted by Ruger, the Scotts, and Data Controls North, Inc. in the amended complaint. As one court has stated, "[w]hen a suit is filed in a federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement." *Barthel v. Stamm*, 145 F.2d 487, 491 (5th Cir.1944), *cert. denied*, 324 U.S. 878, 65 S.Ct. 1026, 89 L.Ed. 1430 (1945). Consequently, the Court finds that the Eagle claims set forth by Ruger, the Scotts, and Data Controls North, Inc. in the amended complaint relate back to the original complaint for purposes of determining the timeliness of the claims.

2. *Rule 10b-5 Claims*

Plaintiff's claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder are implied causes of action; the federal securities

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[10] *See* Footnote 9, *supra*.

laws do not expressly provide civil remedies for violations of Section 10(b) of the Exchange Act and Rule 10b-5. Consequently, the federal securities laws do not provide a statute of limitations that governs the timeliness of 10b-5 claims. In the absence of an applicable federal limitations period, courts have measured the timeliness of 10b-5 claims by reference to state law; that is, courts have measured the timeliness of 10b-5 claims by applying state law limitations periods that govern closely analagous state law causes of action. *See Hill v. Der*, 521 F.Supp. 1370, 1379-83 (D.Del.1981).

In applying this analysis to the facts in this case, the Court has previously determined that the 10b-5 claims of John T. Hill, James Stritzinger, and Descomp, Inc. are governed by the three year limitations period set forth in 10 *Del.C.* § 8106. *Hill v. Equitable Trust Co.*, 562 F. Supp. at 1337-39. In addition, the Court has determined in part, and the parties have otherwise concurred that the 10b-5 claims of Thomas and Patricia Ruger, Virgil and Marie Scott, and Data Controls North, Inc, are governed by the one year limitations period set forth in Md. Corps. & Ass'n. Code Ann. § 11-703(f). *Id.* at 1336.

Although a court must look to state law to determine the limitations period that is applicable to a 10b-5 claim, federal law determines when a 10b-5 cause of action accrues and when the limitations period begins to run on the claim. *Hill v. Der*, 521 F.Supp. at 1387. The parties agree that a 10b-5 cause of action accrues on the date that the purchase or sale of securities in question occurred. The parties, however, disagree as to when the purchases of securities occurred in this case. Equitable contends that plaintiffs purchased their shares of Wilmington House and Eagle on the dates that plaintiffs entered into their subscription agreement. Plaintiffs, on the other hand, contend that each installment payment on the purchase price of their shares constituted separate purchases of partnership interests.

In general, under the federal securities laws, a purchase or sale of securities occurs on the date that a party enters into a binding commitment to undertake a securities transaction, even though full performance of the transaction does not occur until a later date. *See Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890-91 (2d Cir.1972). Conversely, however, if a party enters into an agreement to undertake a securities transaction but, prior to full performance of the transaction, the party possesses the power to terminate it, the party may be viewed as making an investment decision at each point the party possesses the power to terminate the transaction but chooses to go forward. Each such investment decision may be viewed as a purchase or sale of securities separate and apart from the initial agreement to undertake the transaction. *See, e.g., Goodman v. Epstein*, 582 F.2d 388, 409-414 (7th Cir.1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *Ingenito v. Bermec Corp.*, 376 F.Supp. 1154, 1183-84 (S.D.N.Y.1974).

Equitable contends that the "investment decision" doctrine is inapplicable to the facts in this case. Equitable argues that plaintiffs' subscription agreements constituted binding commitments to purchase shares of Wilmington House and Eagle and that the installment payments on the shares simply constituted a fulfillment of plaintiffs' obligations under the subscription agreements. In support of its position, Equitable notes that plaintiffs' installment payments on their Wilmington House shares, and James Stritzinger's installment payments on his Eagle shares, were financed through irrevocable letters of credit. Moreover, Thomas Ruger's, Virgil and Marie Scott's, and Data Controls North, Inc.'s installment payments on their Eagle shares were secured by purported loans to the partnership.

Plaintiffs, however, contend that, after entering into the subscription agreements, they still possessed the means by which to terminate their payment obligations

on their shares. Of principal significance were plaintiffs' rights under the partnership agreements.[11] Apparently,

[11] Plaintiffs have alleged other options that they could have exercised to terminate or otherwise avoid their payment obligations on their shares. Plaintiffs allege that they could have sold their shares; alternatively, they could have rescinded their purchases on grounds of fraud. These options, however, cannot provide the basis for a claim under the investment decision doctrine.

The investment decision doctrine applies only to options that allow a party to avoid going forward with a purchase (or sale) of securities. *See, e.g., Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 812-13 (9th Cir. 1981); *Issen v. GSC Enterprises, Inc.*, 508 F.Supp. 1278, 1286-87 (N.D.Ill. 1981); *Ingenito v. Bermec Corp.*, 376 F.Supp. at 1182-83. A sale of shares by plaintiffs would not have terminated their purchase obligations. To the contrary, plaintiffs' option to sell thier shares necessarily presumes that plaintiffs had purchased the shares and possessed the ownership rights to sell the shares. At most, a sale of shares would have resulted in an assignment of plaintiffs' payment obligations, not a termination of such obligations. Although plaintiffs' right to sell their shares constituted an investment option, it was an option that existed separately from plaintiffs' purchase of their shares. Plaintiffs' foregone opportunities to sell their shares cannot, in themselves, provide a basis for a cause of action under 10b-5; for such foregone investment opportunities fail to satisfy the "purchaser/seller" requirement of stating a cause of action under 10b-5. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975).

Plaintiffs' rescission of their purchases on grounds of fraud certainly would have terminated their purchase obligations. Nevertheless, plaintiffs would have possessed the right to terminate their purchases even if they had paid for their shares in full at the time of entering into the subscription agreements. If plaintiffs had paid for their shares in a lump-sum at the time of entering into the subscription agreements, any right that they might have had to subsequently rescind the purchases on grounds of fraud certainly would not have constituted an investment option under the investment decision doctrine. *See Ingenito v. Bermec Corp.*, 376 F.Supp. at 1176-77. A different result is not compelled simply by the fact that plaintiffs paid for their shares by means of fixed installment payments. *See Freschi v. Grand Coal Venture*, 551 F.Supp. 1220, 1229 n. 9 (S.D.N.Y. 1982). If a party enters into an otherwise legally binding commitment to purchase securities, the applicability

under the partnership agreements, plaintiffs possessed the rights as limited partners to amend the agreements or dissolve the partnerships. Plaintiffs contend that these rights gave rise to investment options and that plaintiffs made investment decisions each time they chose to go forward with their payments rather than exercising these options.

Whether plaintiffs' rights under the partnership agreements gave rise to investment options that are cognizable under the investment decision doctrine depends upon how one views the relationship between plaintiffs' purchase obligations under the subscription agreements and plaintiffs' potential powers to alter these obligations through the exercise of rights under the partnership agreements. For example, it is possible to view plaintiffs' purchase obligations under the subscription agreements as binding commitments that were separate and distinct from plaintiffs' rights under the partnership agreements. Under such a view, plaintiffs purchased their shares at the time of entering into the subscription agreements and simply financed the purchases through installment payments. Consequently, under this view, any rights that plaintiffs

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of the investment decision doctrine should not arbitrarily turn upon how purchase payments are structured under the transaction.

The Court recognizes that the investment options alleged by plaintiffs in this case are substantially similar to those alleged by the plaintiffs in *Goodman v. Epstein*, 582 F.2d at 397-98, 409-14. In *Goodman*, the Seventh Circuit held that whether the investment decision doctrine was applicable to the facts in the case was a question to be decided by the jury. *Id.* at 413. This Court relied upon the decision in *Goodman* in making a similar ruling on defendants' motion to dismiss in *Hill v. Der*, 521 F.Supp. at 1386-87, a decision which in turn was followed by the Court in this case in ruling upon Equitable's original motion to dismiss. *Hill v. Equitable Trust Co.*, 562 F.Supp. at 1339. Nevertheless, to the extent that the Seventh Circuit, in *Goodman*, adopted a broader view of the scope of the investment decision doctrine than that which is now adopted by the Court in this case, the Court declines to follow the *Goodman* decision.

possessed under the partnership agreements to alter their investments would not have given rise to investment options that are cognizable under the investment decision doctrine because the investment options available to plaintiffs simply constituted post-purchase opportunities to alter their investments. Moreover, these foregone investment opportunities would not otherwise provide a basis for a cause of action under 10b-5 because they would fail to satisfy the "purchaser/seller" requirement for stating a claim under 10b-5. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975).

It is, however, also possible to view plaintiffs' purchase obligations under the subscription agreements as conditional commitments, qualified by plaintiffs' option to terminate or otherwise modify these obligations through the exercise of rights under the partnership agreements. Under such a view, each payment made by plaintiffs on their shares constituted a separate purchase of partnership interests since, at the time of each payment, plaintiffs exercised their discretion to forego their option to terminate their payment obligations; consequently, plaintiffs' rights under the partnership agreements would have given rise to investment options that are cognizable under the investment decision doctrine. *See Goodman v. Epstein*, 582 F.2d at 412-13.

Whether plaintiffs state a claim under the investment decision doctrine is, therefore, a factual issue that may not be determined by the Court on the present motion to dismiss. Assuming the truth of plaintiffs' allegations and drawing all reasonable inferences from such allegations in a light most favorable to plaintiffs' claim, each payment on plaintiffs' shares constituted separate purchases of securities under the investment decision doctrine.

Nevertheless, plaintiffs may not invoke the investment decision doctrine with respect to payments made on their

shares after April 1, 1980, when plaintiffs filed suit in *Hill v. Der*. In order to state a claim under the investment decision doctrine, plaintiffs must establish not only that they possessed options to avoid their payments, but also that they would have exercised these options if fraud had not occurred or if they had discovered the fraud. By the time that plaintiffs filed suit in *Hill v. Der*, plaintiffs certainly believed or strongly suspected that they had been defrauded by Der and others in connection with their purchases of Wilmington House and Eagle shares. Yet, after filing suit, plaintiffs did not exercise any rights under the partnership agreements, or take any other action, to prevent the execution of the final payments on their shares.[12] Rather, plaintiffs chose to file suit for fraud.[13]

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[12] At oral argument on the motion to dismiss, plaintiffs indicated that they did not have firm evidence of fraud in connection with their purchases of Eagle shares at the time they filed suit in *Hill v. Der*; rather, they merely suspected fraud. Nevertheless, if these suspicions were ripe enough for plaintiffs to file a lawsuit based upon the suspicions, then they were certainly ripe enough for plaintiffs to exercise investment options allegedly available to them to avoid their payment obligations on their shares.

[13] At oral argument, plaintiffs indicated that the reason why they did not take any actions to prevent execution of the final payments on their shares was that they did not have the resources to both pursue litigation in *Hill v. Der* and bring a state court action in the State of Maryland to enjoin Equitable from honoring the letters of credit issued to finance plaintiffs' payments on their Wilmington House shares and James Stritzinger's payments on his Eagle shares. However, this explanation does not answer why Thomas Ruger, Virgil and Marie Scott, and Data Controls North, Inc., did not take any actions to prevent Eagle's general partners from applying their loans to the partnership as a set-off against the payments due on their shares. More importantly, plaintiffs have failed to explain why they did not exercise any of their alleged options under the partnership agreements to terminate their payment obligations. As discussed above, plaintiffs' right to bring suit to rescind their payment obligations on grounds of fraud does not constitute an investment option cognizable under the investment decision doctrine. In

Admittedly, plaintiffs' notice of fraud on the part of Der and others did not necessarily translate into notice of fraud on the part of Equitable. On this point, plaintiffs allege that, at the time they filed suit in *Hill v. Der*, they had no reason to suspect that Equitable had engaged in fraud in connection with their purchases of partnership shares. Nevertheless, it seems inconceivable that, if plaintiffs had been aware of fraud on the part of Equitable, they would have exercised options to avoid their payment obligations that they did not exercise despite notice of fraud on the part of Der and others. By plaintiffs' own allegations, Der was at the center of the alleged scheme to defraud plaintiffs. Certainly, any rights that plaintiffs could have exercised under the partnership agreements to terminate their payment obligations would have been directed against Der, not Equitable.

Plaintiffs, therefore, may not assert the investment decision doctrine with respect to payments made on their shares after the filing of *Hill v. Der*, on April 1, 1980.[14] Assuming the applicability of the investment decision doctrine to plaintiffs' earlier payments on their shares, plain-

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the final analysis, it is not important why plaintiffs failed to exercise any investment options available to them to avoid their payments on their shares. Rather, under the investment decision doctrine, it is only important that, with notice of fraud, plaintiffs failed to exercise any such options.

[14] The investment decision doctrine can be a double edged sword. Assuming that plaintiffs possessed investment options at the time that payments were made on their shares, it is doubtful whether plaintiffs can recover damages with respect to payments made on their shares after the filing of *Hill v. Der*. Moreover, under 10b-5's "due diligence" standard, plaintiffs might also be barred from recovering damages with respect to earlier payments on their shares if plaintiffs, in the exercise of due diligence, should have discovered fraud prior to the payments. *See, e.g., Straub v. Vaisman & Co., Inc.*, 540 F.2d 591, 596-98 (3d Cir. 1976); *McLean v. Alexander*, 420 F.Supp. 1057, 1077-78 (D.Del. 1976), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

tiffs' 10b-5 cause of action accrued on the dates of the last such payments.[15] Plaintiffs' Wilmington House claims accrued on February 1, 1980 and plaintiffs' Eagle claims accrued on June 1, 1979.

The limitations periods applicable to plaintiffs' 10b-5 claims did not necessarily begin to run on the date on which the causes of action accrued. Under the federal doctrine of "equitable tolling", the statute of limitations does not begin to run on a cause of action for fraud if the plaintiff "remains in ignorance of [the fraud] without any fault or lack of diligence on his part." *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946). However, once a plaintiff becomes aware, or should have been aware, of sufficient "storm warnings" of fraud to place the plaintiff on "inquiry notice", the plaintiff must exercise reasonable diligence in investigating the cause of action for fraud. *See, e.g., Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690, 692-93 (8th Cir. 1981); *Cook v. Avien, Inc.*, 573 F.2d 685, 696 (1st Cir. 1978). The statute of limitations begins to run once the plaintiff is aware of, or should have been aware of, enough facts pointing to fraud that the possibility of fraud is, or should have been, apparent.[16] *Cf., Hill v. Der*, 521 F. Supp. at 1388 (apply-

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[15] The parties apparently agree that, assuming the applicability of the investment decision doctrine, plaintiffs' payments for their shares are to be considered integrated purchases of securities. As such, plaintiffs' 10b-5 cause of action accrued on the dates that the last payments were made on the shares, rather than on the dates of each separate payment.

[16] In applying the doctrine of equitable tolling, some courts have distinguished between cases where defendants have committed fraud and subsequently attempted to conceal the fraud, and cases where defendants have simply committed fraud without undertaking subsequent acts to conceal the fraud. These courts have held that, in instances where fraud is compounded by active concealment, the statute of limitations does not begin to run until a plaintiff actually discovers the fraud. *See, e.g., Robertson v. Seidman*

ing the reasonable diligence standard under § 13 of the Securities Act of 1933); *Ingenito v. Bermec*, 441 F. Supp. 525, 554 (S.D.N.Y. 1977) (same).

Plaintiffs contend that they had no reason to believe that Equitable had committed fraud in connection with their purchase of partnership shares until March of 1982, when plaintiffs learned that employees of Equitable had received kickbacks in connection with the Wilmington House letters of credit. Plaintiffs acknowledge that storm warnings began to appear in 1979, such as the bankruptcy of Wilmington House's principal asset, Lancaster Court Associates, revealing that their investments were not as sound as they had been led to believe.[17] Nev-

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& Seidman, 609 F.2d 583, 593 (2d Cir. 1979); *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975). This Court cited this rule in its Opinion on Equitable's and original co-defendant Mercantile's previous motions to dismiss. *Hill v. Equitable Trust Co.*, 562 F.Supp. at 1344. However, upon further consideration, the Court has determined that a defendant's active concealment of fraud should not relieve a plaintiff of his duty to exercise reasonable diligence in discovering the fraud. Rather, a defendant's acts of concealment should only be a factor in determining when a plaintiff, in the exercise of reasonable diligence, should have discovered fraud. A growing number of courts have adopted such a rule. *See, e.g., Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982); *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694-95 (10th Cir.), *cert. denied*, 454 U.S. 895, 102 S.Ct. 392, 70 L.Ed.2d 309 (1981); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169-70 (5th Cir. 1979), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980).

[17] Plaintiffs contend that the 1979 storm warnings related principally to the Wilmington House partnership. Plaintiffs allege that they did not become aware of the severe financial deterioration of the Eagle partnership until the summer of 1981, when Martin E. Mason informed them of Eagle's financial problems. Nevertheless, at oral argument on the present motion to dismiss, plaintiffs indicated that in the latter part of 1979 and early part of 1980, Der had informed plaintiffs that a declining demand for coal would require a restructuring of Eagle's operations and necessitate substantial, unanticipated capital outlays. Apparently, this disclosure sufficiently raised plaintiffs' suspicions of fraud for plaintiffs to

ertheless, plaintiffs argue that these storm warnings, at most, placed them on inquiry notice of fraud on the part of Der and other principals behind the partnerships; at the time, Equitable appeared to be simply a bank involved in the financing of their purchase of partnership shares. Furthermore, plaintiffs contend that, although in February and March of 1981, they wrote letters to Equitable and the Maryland State Bank Commissioner inquiring about improprieties regarding Equitable's relationship with Der and Equitable's financing of their purchases, any suspicions that they had of wrongdoing on the part of Equitable were laid to rest by Equitable's letters denying any improprieties and the Bank Commissioner's failure to take further action on the matter.

Plaintiffs' assertions regarding their lack of notice of fraud on the part of Equitable are belied by plaintiffs' own allegations against Equitable. Plaintiffs allege that at a November 6, 1978 meeting set up by Der to discuss the financing for plaintiffs' purchases of Eagle shares, Equitable's Vice President, R. Kenneth Rous, made various misrepresentations to plaintiffs concerning the Eagle partnership, including the misrepresentation that Eagle was a sound investment. Moreover, plaintiffs allege that they interpreted and relied upon this representation as an implicit assurance that the Wilmington House partnership was a sound investment, given that Der was the central principal behind both partnerships. In light of these alleged misrepresentations, it would seem that plaintiffs were placed on inquiry notice of fraud on the part of Equitable, if not in 1979 when storm warnings of fraud began to appear, then at least by April 1, 1980, when plaintiffs filed suit in *Hill v. Der*. By the time that plaintiffs filed suit in *Hill v. Der*, plaintiffs believed or strongly suspected that they had been fraudulently induced into purchasing Wilmington House and Eagle

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file claims of fraudulent misrepresentation in connection with their purchase of Eagle shares in *Hill v. Der*.

shares through various misrepresentations by Der and others concerning the soundness of the investments. Although, given Equitable's collateral role in plaintiffs' purchases, plaintiffs might not have possessed firm grounds for believing that any similar misrepresentation by Equitable were anything more than innocent, unknowing misrepresentations, it would seem that plaintiffs, by this time, should have suspected the possibility of fraud on the part of Equitable. *See, e.g., Cahill v. Ernst & Ernst*, 448 F. Supp. 84, 86 (E.D. Wis. 1978); *Ingenito v. Bermec Corp.*, 441 F. Supp. at 554.

Despite such elements of inquiry notice, plaintiffs have set forth almost no allegations of diligent efforts undertaken prior to the commencement of this suit to investigate the possibility of fraud in connection with these and other alleged misrepresentations by Equitable. Plaintiffs' fraudulent misrepresentation claims were asserted for the first time in the amended complaint. Plaintiffs uncovered the basis for these claims primarily through discovery in this suit and *Hill v. Der*. Plaintiffs contend that their ability to uncover the basis for these claims prior to the commencement of this action was impeded by the suspension of discovery in *Hill v. Der* from mid-1980 to the end of 1981, during the Court's consideration of defendant's motion to dismiss. Nevertheless, to the extent that discovery was suspended in *Hill v. Der*, plaintiffs could have relied upon other means of investigating their potential claims against Equitable.

Plaintiffs have also set forth few allegations of diligent efforts to investigate other alleged acts of fraud by Equitable, such as those relating to the alleged kickbacks received by employees of Equitable in connection with the Wilmington House letters of credit. In fact, plaintiffs admit that they learned of the kickbacks out of the blue, when Martin E. Mason phoned Thomas Ruger on his own initiative to disclose the kickbacks. In their letters to Equitable in March of 1981, John T. Hill and Virgil

Scott inquired whether any employees had been terminated by the bank due to improprieties in connection with the Wilmington House letters of credit. However, plaintiffs undertook no further efforts to follow up on their suspicions of wrongdoing. Plaintiffs contend that they were lulled to sleep by Equitable's denial of improprieties. However, it is questionable whether plaintiffs fulfilled their duties of reasonable diligence by simply relying upon Equitable's denial of wrongdoing and failing to undertake further investigative efforts. *See Militsky v. Merrill Lynch, Pierce, Fenner & Smith*, 540 F. Supp. 783, 787 (N.D. Ohio 1980).

Based upon the pleadings, there is very little evidence to indicate that plaintiffs exercised reasonable diligence in investigating their potential claims against Equitable. However, the picture in this case is somewhat clouded by Equitable's collateral role in plaintiffs' purchases of shares and Equitable's denial of improprieties in response to plaintiffs' inquiries. The question of reasonable diligence under the doctrine of equitable tolling raises factual issues that rarely may be decided by a court as a matter of law. *See Kubik v. Goldfield*, 479 F.2d 472, 477 N. 12 (3rd Cir. 1973) (applying the reasonable diligence standard under § 13 of the Securities Act of 1933). Admittedly, this case appears to stretch the limits of this principle. Nevertheless, the pleadings raise sufficient factual questions to preclude the Court from ruling that any of plaintiffs' 10b-5 claims are time-barred as a matter of law.

3. *Section 20(a) Claim*

As with plaintiffs' 10b-5 claims against Equitable, plaintiffs' claim under § 20(a) of the Securities Exchange Act of 1934 is not expressly governed by a statute of limitations set forth in the Act. Section 20(a) of the Exchange Act establishes joint and several liability on the part of any person who directly or indirectly controls another

person who violates a section of the Act or a rule promulgated thereunder. The Court has previously ruled that, since the liability of a controlling person under § 20(a) of the Exchange Act is joint and several with the liability of the controlled person, and is predicated upon the Exchange Act violations of the controlled person, a § 20(a) claim against a controlling person is governed by the same limitations period that is applicable to the Exchange Act claims against the controlled person. *Hill v. Equitable Trust Co.*, 562 F. Supp. at 1341.

Plaintiffs' § 20(a) claim against Equitable is predicated upon 10b-5 violations allegedly committed by Der and other Eagle principals in connection with plaintiffs' purchases of Eagle shares. In *Hill v. Der*, this Court has previously ruled that the limitations period applicable to plaintiffs' 10b-5 claims against these Eagle principals is the two year limitations period provided by 6 *Del.C.* § 7323(e). *Hill v. Der*, 521 F. Supp. at 1385. Consequently, plaintiffs' § 20(a) claim against Equitable is governed by the same two year limitations period.

Plaintiffs' § 20(a) cause of action accrued on the date or dates that plaintiffs' purchased their Eagle shares. The question of when plaintiffs purchased their shares turns upon whether the investment decision doctrine is applicable to the facts of the case. Nevertheless, as previously discussed, even assuming that plaintiffs' payments on their shares constituted separate purchases of securities under the investment decision doctrine, plaintiffs may not assert the doctrine with respect to payments made on their shares after the filing of *Hill v. Der*. Consequently, plaintiffs' § 20(a) cause of action accrued, at the latest, on June 1, 1979, the date of plaintiffs' last payment on their Eagle shares prior to the filing of *Hill v. Der*.

Plaintiffs' § 20(a) cause of action, therefore, accrued more than two years prior to the commencement of this suit. Nevertheless, whether plaintiffs' § 20(a) claim is

time-barred under the two year limitations period depends upon how the doctrine of equitable tolling applies to the facts in this case. As discussed previously, this factual issue may not be determined by the Court on the present motion to dismiss.

4. *Section 12(2) and Section 15 Claims*

Plaintiffs' claims under § 12(2) of the Securities Act of 1933 are governed by the statute of limitations set forth in § 13 of the Act. Section 13 of the Securities Act provides that a § 12(2) claim must be brought within one year of the date on which the § 12(2) violation was discovered or should have discovered in the exercise of reasonable diligence; but that, in no event, may a § 12(2) claim be brought more than three years after the sale of securities at issue.

Plaintiffs' claim under § 15 of the Securities Act is also governed by the statute of limitations set forth in § 13 of the Act. Section 15 of the Securities Act establishes joint and several liability on the part of any person who directly or indirectly controls another person who violates certain provisions of the Act, including § 12(2). Claims brought under § 15 of the Securities Act are not expressly governed by the statute of limitations set forth in § 13 of the Act. Nevertheless, as is the case with respect to a § 20(a) claim under the Exchange Act, a §15 claim against a controlling person is governed by the same limitations period that is applicable to the Securities Act claims against the controlled person. *Hill v. Equitable Trust Co.*, 562 F. Supp. at 1341. Here, plaintiffs' §15 claim is predicated upon § 12(2) violations allegedly committed by Der and other Eagle principals in connection with plaintiffs' purchase of Eagle shares; violations which are governed by § 13 of the Securities Act.

Section 13 of the Securities Act establishes an absolute three year limitations period for bringing suit under § 12(2) of the Securities Act or, in this case, § 15 of the

Securities Act as well. Although there is some authority to the contrary, *see In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 337, 344-45 (N.D. Okla. 1975), most courts have held that § 13's three year limitations period is not affected by the doctrine of equitable tolling. *See, e.g., Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1308 (9th Cir. 1982); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106, 102 S.Ct. 3484, 73 L.Ed.2d 1367 (1982). The doctrine of equitable tolling is a federal common law doctrine that may be preempted by congressional mandate. Section 13 of the Securities Act clearly provides that, in no event, may a claim be brought under § 12(2) of the Act more than three years after the sale of securities in question.

Plaintiffs' § 12(2) and § 15 claims would, therefore, be barred by § 13's three year limitations period if plaintiffs purchased their Wilmington House and Eagle shares more than three years prior to the commencement of this suit. Whether plaintiffs' purchases fell within the three year limitations period turns upon whether plaintiffs' payments on their shares represented purchases of partnership interests under the investment decision doctrine.[18]

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[18] Equitable contends that the investment decision doctrine is a limited doctrine that applies only to claims brought under § 10(b) of the Exchange Act and therefore, may not be relied upon by plaintiffs with respect to their § 12(2) and § 15 claims. Equitable argues that the investment decision doctrine is based upon a broad construction of the phrase "purchase of securities" and that, while § 10(b) of the Exchange Act broadly proscribes fraud in connection with the purchase or sale of securities, § 12(2) of the Securities Act only proscribes fraud in connection with the sale of securities. Consequently, although plaintiffs might have possessed investment options after entering into their subscription agreement, options which gave rise to investment decisions each time plaintiffs made payments on their shares, these investment decisions occurred after the partnership shares were sold to plaintiffs; for the sale of the

As discussed previously, plaintiffs may not assert the investment decision doctrine with respect to payments made on their shares after the filing of *Hill v. Der*. Nevertheless, assuming that the investment decision doctrine is otherwise applicable to plaintiffs' payments on their shares, plaintiffs' last purchases of interests in the Wilmington House partnership occurred on February 1, 1980, and plaintiffs' last purchases of interests in the Eagle partnerships occurred on June 1, 1979. These purchases of partnership interests would fall within § 13's three year limitations period. Consequently, at this point in the proceedings, the Court cannot rule as a matter of law that plaintiffs' § 12(2) and § 15 claims are barred by § 13's three year limitations period.[19]

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shares occurred when plaintiffs entered into the subscription agreements.

If the Court were to embrace the exceedingly broad interpretation of the investment decision doctrine asserted by plaintiffs, Equitable's argument would have merit. Plaintiffs have set forth investment options, such as the option to sell their shares, which existed quite independently of the sale of shares to plaintiffs. However, as previously discussed, the Court believes that the scope of the investment decision doctrine is much narrower then is asserted by plaintiffs. *See* Footnote 11. Properly construed, the investment decision doctrine applies to options that allow a party to avoid going forward with a purchase (or sale) of securities, not options that allow a party to alter his investment after a purchase has occurred. Therefore, under the investment decision doctrine, a purchase of securities is simply a mirror image of a sale of securities. The investment decision doctrine is simply a principle by which to determine when a purchase or sale of securities has occurred. In applying the investment decision doctrine, courts have not limited its application solely to claims brought under § 10(b) of the Exchange Act. *See Ingenito v. Bermec Corp.*, 376 F.Supp. at 1183 n. 12; *Gross v. Independence Shares Corp.*, 36 F.Supp. 541 (E.D. Pa. 1941).

[19] As noted previously, *see* Footnote 15, the parties appear to agree that assuming the applicability of the investment decision doctrine, plaintiffs' payments for their shares are to be considered integrated purchases of securities. Consequently, plaintiffs would not be barred from asserting claims with respect to any of their

Plaintiffs' § 12(2) and § 15 claims would also be time-barred under § 13 of the Securities Act if plaintiffs brought suit more than one year after the date on which they should have discovered their causes of action in the exercise of reasonable diligence. However, for reasons previously discussed, the Court finds that plaintiffs' pleadings raise sufficient questions as to when plaintiffs should have discovered their causes of action in the exercise of due diligence to prevent the Court from ruling as a matter of law that plaintiffs' 12(2) and § 15 claims are time-barred under § 13's one year limitations period.

MERITS OF CLAIMS

1. *Primary Liability*

Plaintiffs have set forth two general types of fraud allegedly committed by Equitable, which purportedly state a claim of primary liability under 10b-5. First, plaintiffs allege that Equitable failed to disclose material information to plaintiffs concerning their investments in the Wilmington House and Eagle partnerships, which Equitable had an affirmative duty to disclose. For example, plaintiffs maintain that Equitable failed to disclose the kickbacks allegedly received by employees of the bank in connection with the Wilmington House letters of credit and that Equitable failed to disclose its financial conflicts of interests with respect to the sale of Eagle shares, as well as the alleged "bailout" purpose behind the resyndication of the partnership. Second, plaintiffs alleged that, at a November 6, 1978 meeting set up by Der to discuss the financing of plaintiffs' purchases of Eagle shares, R. Kenneth Rous, a Vice President of Equitable, made certain misrepresentations to plaintiffs concerning the Eagle partnership. Rous allegedly misrepresented that Eagle was a sound investment, that

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payments if at least one payment fell within the limitations time period.

Equitable had no conflicts of interests in the sale of Eagle shares, that Equitable planned to make substantial equipment loans to the partnership, and that the Eagle private Placement Memorandum was accurate, when in fact the document contained false and misleading representations concerning the reasons behind the resyndication of the partnership. Furthermore, plaintiffs allege that they interpreted and relied upon Rous' representation concerning the soundness of the Eagle partnership as an implicit assurance that the Wilmington House partnership was also a sound investment, to the extent that Der was the central principal behind both partnerships.

Equitable has challenged the merits of plaintiffs' claims on a number of grounds. Equitable notes that the fraudulent acts allegedly committed by Equitable in connection with plaintiffs' purchases of Wilmington House shares occurred after plaintiffs had entered into their subscription agreements. Similarly, most of the fraudulent acts allegedly committed by Equitable in connection with plaintiffs' purchases of Eagle shares occurred on November 6, 1978, after all plaintiffs, except James Stritzinger, had entered into their subscription agreements. Equitable argues that, consequently, Equitable's alleged acts of fraud lacked a causal nexus to plaintiffs' purchases of shares and therefore plaintiffs fail to state a claim under 10b-5 for fraud in connection with the purchase or sale of securities.

Equitable's argument is predicated on the assumption that plaintiffs' payments on their shares did not constitute purchases of securities under the investment decision doctrine. As discussed previously, whether this assumption is correct is a factual issue that may not be decided by the Court on the present motion to dismiss.

Equitable also contends that it did not owe plaintiffs an affirmative duty of disclosure under 10b-5. Equitable argues that any duties of disclosure that it owed to plain-

tiffs were simply those that arose from and related to Rous' alleged misrepresentations at the November 6, 1978 meeting.

The legal standard governing affirmative disclosure duties under 10b-5 was established by the Supreme Court in *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980). In *Chiarella*, the Court held that a duty of affirmative disclosure arise only in instances where there exists a fiduciary relationship, or similar relationship of trust and confidence, between parties. *Id.* at 228, 100 S.Ct. at 1114. In this case, Equitable clearly did not occupy a fiduciary role with respect to plaintiffs, as a lender or otherwise. *See Noonan v. Granville Smith*, 537 F. Supp. 23, 27 (S.D.N.Y. 1981). The question remains, however, whether Equitable occupied a similar relationship of trust and confidence with respect to plaintiffs.[20]

The Court finds that the pleadings fail to support the conclusion that Equitable occupied such a relationship of trust and confidence. With the exception of James Stritzinger, Equitable rejected plaintiffs' applications for letters of credit in connection with their purchases of Eagle shares. Moreover, all of plaintiffs' applications for letters of credit, both with respect to Wilmington House and Eagle, were principally handled through Der. Prior to the November 6, 1978 meeting, plaintiffs had little, if any, direct contact with the bank. These circumstances belie the conclusion that Equitable occupied a position of high trust and confidence with respect to plaintiffs. In

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[20] Plaintiffs have set forth other grounds out of which an affirmative duty of disclosure allegedly arose in this case. *See, e.g., Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) (conflicts of interest); *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1170-72 (2d Cir. 1970) (market making); *White v. Abrams*, 495 F.2d 724, 735-36 (9th Cir. 1974) (flexible duty). However, to the extent that the theories of disclosure set forth in these cases are inconsistent with the Supreme Court's holding in *Chiarella*, the Court rejects these theories.

fact, at least by early 1981, plaintiffs suspected improprieties in the handling of their letters of credit. Plaintiffs allege that at the November 6, 1978 meeting, Rous made very general representations about the Eagle partnership, which arguably constituted implicit representations about the Wilmington House partnership as well. Nevertheless, even if Rous' actions could be viewed as advising plaintiffs about their investments, this isolated incident hardly gave rise to the type of relationship of high trust and confidence that is contemplated by the *Chiarella* holding. Consequently, the Court finds, as a matter of law, that Equitable did not owe an affirmative duty of disclosure to plaintiffs, apart from the duties of disclosure that arose from and related to the alleged misrepresentations made by Rous at the November 6, 1978 meeting.

With respect to Rous' alleged misrepresentations, Equitable contends that only Thomas Ruger and Virgil Scott may state a claim on the basis of the misrepresentations. Equitable argues that Ruger and Scott were the only plaintiffs present at the November 6, 1978 meeting and that, therefore, Rous could not have intended to defraud the other plaintiffs through the misrepresentations.

Equitable's argument is without merit. The fact that only Ruger and Scott were present at the November 6, 1978 meeting does not preclude the possibility that Rous intended for Ruger and Scott to communicate the misrepresentations to the other plaintiffs. Rous was potentially aware of the Wilmington House plaintiffs through their letters of credit. Rous was also potentially aware of those Eagle plaintiffs who had entered into their subscription agreements prior to the meeting. These Wilmington House and Eagle plaintiffs include Descomp, Inc., and Data Controls North, Inc., corporations managed and controlled by Ruger and Scott; Ruger's wife, Patricia Ruger, and Scott's wife, Marie Scott. Furthermore, plaintiffs allege that Rous was informed at the meeting that

James Stritzinger, a friend of Ruger and Scott, was seriously interested in purchasing Eagle shares. Thus, it is quite possible that Rous intended for Ruger and Scott to communicate his misrepresentations to the other plaintiffs, in order to promote and protect Equitable's interests in the Eagle partnership, as well as the Wilmington House partnership.

Also, it is not necessary that Rous have intended for Ruger and Scott to communicate his misrepresentations to other plaintiffs in order for liability to arise under 10b-5 with respect to the other plaintiffs. Rule 10b-5 imposes liability for reckless misrepresentations, as well as intentional misrepresentations. *See Sharp v. Coopers Lybrand*, 649 F.2d 175, 193 (3d Cir.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed. 648 (1982). If Rous had special reasons to expect that Ruger and Scott might communicate the misrepresentations to other plaintiffs, then liability would arise with respect to the other plaintiffs. *See Restatement (Second) of Torts*, § 531, 533 (1977). Certainly, it is possible that Rous had special reasons to expect that Ruger and Scott might communicate his misrepresentations to other plaintiffs.

Finally, Equitable contends that plaintiffs' allegations regarding Rous' implicit misrepresentations about the soundness of the Wilmington House partnership are "simply absurd." Equitable's position is certainly not without merit. It would seem that if Rous had intended to mislead plaintiffs about their Wilmington House investments, he would have done so through direct misrepresentations. Nevertheless, the Court cannot say as a matter of law that, if Rous intended to mislead plaintiffs about the soundness of the Wilmington House partnership, it is inconceivable that he would have done so through implicit misrepresentations. More importantly, as discussed above, recklessness is the standard of liability under 10b-5. The Court cannot say as a matter of law that, if Rous made misrepresentations about the sound-

ness of the Eagle partnership, these misrepresentations did not recklessly mislead plaintiffs about the soundness of the Wilmington House partnership, given that Der was the central principal behind both partnerships.

Assuming, then, the truth of plaintiffs' allegations and drawing all reasonable inferences from the allegations in a light most favorable to plaintiffs' claims, plaintiffs state a claim under 10b-5 with respect to Rous' alleged misrepresentations at the November 6, 1978 meeting.[21] Plaintiffs not only state a claim with respect to the affirmative misrepresentations themselves, but also state a claim with respect to Rous' failure to disclose material information which rendered the representations false or misleading, and Equitable's intentional or reckless failure to subsequently disclose newly acquired information which rendered the representations false or misleading at the time of representation.[22] *See, e.g., Greenfield v. Heublein,*

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[21] Lurking within this case is the issue of whether Equitable may be liable for the federal securities law violations of its employees. The Third Circuit has held that the doctrine of "respondeat superior" is generally inapplicable to federal securities law claims. *See Rochez Brothers, Inc. v. Rhoades,* 527 F.2d 880, 884 (3d Cir. 1975). *But see Sharp v. Coopers & Lybrand,* 649 F.2d at 181-84 (limited exception for brokerage and accounting firms based upon their positions of high trust in the marketplace). Consequently, if the fraudulent acts of Equitable's employees may not be directly attributable to Equitable as official acts of the bank, *see Sharp v. Coopers & Lybrand,* 649 F.2d at 182 n. 8, then Equitable may be liable for the employees' federal securities law violations only as a controlling person of the employees under § 20(a) of the Exchange Act or § 15 of the Securities Act. However, in order to establish liability on the part of Equitable as a controlling person of its employees, plaintiffs would have to establish that Equitable "culpably participated" in the employees' securities law violations. *See Rochez Brothers, Inc. v. Rhoades,* 527 F.2d at 890.

[22] Apart from the implied misrepresentation regarding the Wilmington House partnerships, Equitable has not challenged the materiality of the specific misrepresentations and omissions alleged by plaintiffs. Consequently, the Court expresses no judgment on this matter at this time.

Inc., 575 F.Supp. 1325, 1336 (E.D.Pa.1983); *Rose v. Arkansas Valley Environmental & Utility Authority*, 562 F.Supp. 1180, 1207-08 (W.D.Mo.1983).

2. *Aiding and Abetting, and Conspiracy Liability*

Plaintiffs allege that Equitable is liable under Rule 10b-5 and § 12(2) of the Securities Act as an aider and abetter of, and co-conspirator with, Der and other Wilmington House and Eagle principals in connection with schemes to defraud plaintiffs into purchasing shares of the partnerships. Plaintiffs allege that, in furtherance of the Wilmington House scheme, Equitable issued letters of credit to finance plaintiffs' purchase of shares in return for kickbacks. Plaintiffs allege that the essence of the Eagle scheme was an undisclosed plan to bail out the financially troubled partnership, and bail out Equitable's loans to the partnership, through the resyndication of the partnership and the sale of shares to plaintiffs. Plaintiffs allege that, in furtherance of this scheme, Equitable made misrepresentations to plaintiffs at the November 6, 1978 meeting.

In order to establish aiding and abetting liability under the federal securities laws, a plaintiff must prove: (a) an underlying securities violation; (b) knowledge by the aider and abetter of the wrongful act which constitutes the violation; and (c) knowing and substantial assistance in the wrongful act by the aider and abetter. *See Monsen v. Consolidated Dressed Beef Company, Inc.*, 579 F.2d 793, 799 (3d Cir.), *cert. denied sub nom., First Pennsylvania Bank, N.A. v. Monsen*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978). Mere inaction on the part of the aider and abetter may be sufficient to establish liability if the aider and abetter consciously intended to assist in the perpetration of the wrongful act. *See Id.* at 800.

In order to establish conspiracy liability under the federal securities laws, a plaintiff need only establish: (a)

a wrongful act which constitutes a securities violation; and (b) an agreement between the conspirator and the wrongdoer to commit the wrongful act. *See Troyer v. Karcagi*, 476 F.Supp. 1142, 1153 (S.D.N.Y.1979). The agreement to commit a wrongful act is the central element of a conspiracy. In establishing conspiracy liability, an agreement may be inferred from the facts in a case. *See Ferguson v. Omnimedia, Inc.*, 469 F.2d 194, 198 (1st Cir.1972).

Plaintiffs' allegations are sufficient to state claims of aiding and abetting and conspiracy against Equitable. The Wilmington House letters of credit, together with the alleged kickbacks, provide a sufficient basis for an inference that Equitable knowingly provided substantial assistance to Der and others in a scheme to defraud plaintiffs in connection with their Wilmington House shares. *See, e.g., Vogel v. Trahan* [1979-1980 Transfer Binder] Fed. Sec.L.Rep. (CCH) ¶ 97,303, at 97,082 (E.D. Pa.1980); *Tucker v. Janota* [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,701, at 94, 715-16 (N.D.Ill. 1978). Moreover, the alleged kickbacks provide a sufficient basis for an inference that Equitable entered into a conspiratorial agreement to defraud plaintiffs in connection with their Wilmington House shares. Equitable's alleged misrepresentations at the November 6, 1978 meeting provide a sufficient basis for an inference that Equitable knowingly provided substantial assistance to Der and others in a scheme to defraud plaintiffs in connection with their Eagle shares. *See E.D. Warde & Sons v. Colorado National Bank*, 502 F.Supp. 461, 464 (D.Colo. 1980). Furthermore, the circumstances surrounding the resyndication of the Eagle partnership provide a sufficient basis for an inference that Equitable entered into a conspiratorial agreement to defraud plaintiffs in connection with their Eagle shares.[23]

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[23] Equitable contends that plaintiffs may not state an aiding and abetting or conspiracy claim under § 12(2) of the Securities Act

3. *Controlling Persons Liability*

Plaintiffs claim that Equitable is liable under § 20 of the Exchange Act and § 15 of the Securities Act, based upon Equitable's role as a controlling person of Der and other Eagle principals in connection with the alleged fraudulent bail out scheme. Plaintiffs contend that Equitable helped engineer the scheme in order to recoup its outstanding loans to the Eagle partnership. Moreover, plaintiffs contend that Equitable possessed the financial leverage to dictate the bail out, given that the partnership was in substantial risk of defaulting on its loans at the time of the resyndication. In sum, plaintiffs argue that Equitable possessed the power, and exercised the power, to engineer a plan to defraud plaintiffs in connection with an undisclosed bail out scheme.

In order to state a claim under § 20 of the Exchange Act or § 15 of the Securities Act, a plaintiff need only establish that the controlling person possessed indirect, de facto control over the wrongful acts of the controlled person. *See Gould v. American-Hawaiian Steamship Co.*,

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because § 12(2), on its face, only provides for a cause of action by a purchaser of securities against his immediate seller. The Third Circuit has held that, in general, a purchaser of securities may not state a cause of action under § 12(2) against persons other than his immediate seller. *Collins v. Signetics Corp.*, 605 F.2d 110, 112-13 (3d Cir. 1979). However, the Court has expressly declined to rule upon the question of whether an aiding and abetting claim provides an exception to § 12(2)'s privity requirement. *Id.* at 113-14. The issue is a difficult one because the liability of a seller's aider and abetter or conspirator derives from the securities violations of the seller. Many courts have held that aiding and abetting and conspiracy claims provide an exception to § 12(2)'s privity requirement. *See, e.g., Frankel v. Wyllie & Thornhill, Inc.*, 537 F.Supp. 730, 744 (W.D.Va. 1982); *deBruin v. Andromeda Broadcasting Systems, Inc.*, 465 F.Supp. 1276, 1280 (D.Nev. 1979); *Stern v. American Bankshares Corp.*, 429 F.Supp. 818, 824 (E.D.Wis. 1977); *Lorber v. Beebe*, 407 F.Supp. 279, 287-88 (S.D.N.Y. 1975). The Court has determined to follow this well established exception to § 12(2)'s privity requirement.

535 F.2d 761, 779 (3d Cir. 1976). Furthermore, the liability of a controlling person does not turn upon whether he dictated the wrongful acts of the controlled person. Mere inaction on the part of the controlling person is sufficient, if he intended to thereby assist in the wrongdoing. *See Rochez Brothers, Inc. v. Rhoades*, 527 F.2d 880, 890 (3d Cir. 1975). In any event, however, liability under § 20 of the Exchange Act or § 15 of the Securities Act requires "culpable participation" on the part of the controlling person. *See, e.g., Gould v. American-Hawaiian Steamship Co.*, 535 F.2d at 779; *Rochez Brothers, Inc. v. Rhoades*, 527 F.2d at 890.

The Court has some doubt as to the merits of plaintiffs' claims. Even assuming that a fraudulent bail out scheme was perpetrated in this case, the question remains as to who had the power to control whom. If, as plaintiffs allege, Equitable's loans to the partnership were in substantial risk of default and Equitable faced the prospects of heavy financial losses upon default, it would seem that Der and other principals possessed as much leverage over Equitable as Equitable possessed over the principals. Nevertheless, the circumstances surrounding the resyndication of the Eagle partnership, as alleged by plaintiffs, certainly could give rise to a set of facts that would support plaintiffs' bail out theory. Further resolution of this matter must await a fuller development of the facts.

PARTICULARITY OF PLEADINGS

Equitable alleges that many of plaintiffs' claims must be dismissed for failure to state a cause of action with the degree of particularity required by Fed. R. Civ. P. 9(b). The Court, however, is sufficiently satisfied that the claims that remains in this case are potentially meritorious ones and that Equitable has been given sufficient notice of the claims asserted against it.

An Order will be entered in accordance with this Opinion.

APPENDIX F

UNITED STATES DISTRICT COURT
D. DELAWARE

Civ. A. No. 82-220

JOHN T. HILL, *et al.*,
Plaintiffs,

v.

THE EQUITABLE TRUST COMPANY, *et al.*,
Defendants.

May 3, 1983

OPINION

CALEB M. WRIGHT, Senior District Judge.

This action, involving eight plaintiffs and two defend-and banks, concerns various alleged violations of the Securities Act of 1933 (hereinafter "1933 Act"), the Securities Exchange Act of 1934 (hereinafter "1934 Act"), and regulations of the Securities and Exchange Commission promulgated thereunder. In addition, the plaintiffs further allege various state law claims pursuant to the laws of Delaware and Maryland. Although the Complaint purports to set forth only eight counts, the two counts based on the securities laws allege violations of numerous sections of the 1933 and 1934 Act. Jurisdiction is predicated on Section 22(a) of the 1933 Act, 15

U.S.C. § 77v(a), Section 27 of the 1934 Act, 15 U.S.C. § 78aa, and pedent jurisdiction.

The case is currently before the Court on the defendant's, Equitable Bank, N.A.[1] (hereinafter "Equitable"), Motion to Dismiss and/or Quash Return of Service, and the defendant's, Mercantile-Safe Deposit & Trust Company (hereinafter "Mercantile"), Renewed Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b). Equitable has moved for dismissal on the following grounds: (1) personal jurisdiction in Delaware is lacking: (2) venue is improper under the securities laws and 12 U.S.C. § 94 (venue pertaining to national banks); (3) the plaintiffs' securities law claims are barred under the applicable statute of limitations; (4) the plaintiffs have failed to set forth securities law claims upon which relief can be granted; (5) the Court lacks subject matter jurisdiction over the pendent state law claims because there are no cognizable federal claims; and (6) the punitive damages sought by the plaintiffs, as a matter of law, are not recoverable under the federal securities laws. The defendant Mercantile asserts the same grounds for dismissal except that it does not contest the propriety of jurisdiction and venue in this district.[2] In connection with the portion of the defendants' motion that seeks dismissal for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the parties have filed affidavits and other extrinsic materials. Consequently, except to those issues which pertain to jurisdic-

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[1] Equitable Bank, N.A. is the successor in interest to the named defendant, The Equitable Trust Company. Subsequent to the date this action was filed, The Equitable Trust Company became a national banking association.

[2] Mercantile initially contested the propriety of jurisdiction and venue in Delaware and briefed those issues. Subsequently, in a letter to the Court dated February 14, 1983, Mercantile waived these defenses. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492 (1982) (waiver of jurisdictional issues proper).

tion and venue, the defendants' motions must be treated as motions for summary judgment made pursuant to Fed. R. Civ. P. 56.[3] Fed. R. Civ. P. 12(b); *see Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121, 126-27 (3d Cir. 1978).

The Court is initially confronted with interpreting the lengthy yet rather nebulous Complaint filed in this case. In addition, the plaintiffs in their briefs and at oral argument have alleged various facts which do not appear in the current record. Nevertheless, because a presentation of the facts is essential to any discussion of the legal problems in this case, the Court has attempted to distill and set forth the operative facts as thus far developed in the record. The facts and legal analysis are first presented as they pertain to the Wilmington House Associates (hereinafter "Wilmington House") transaction and then as they relate to the Eagle Associates (hereinafter "Eagle") venture.[4]

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[3] The Court did not inform the parties that this motion would be treated as one for summary judgment, although all parties submitted affidavits and were aware of the requirements of Rule 12(b). Nevertheless, in this Circuit, it is required that the parties be notified that a motion to dismiss will be treated as one for summary judgment, primarily to afford the party opposing the motion time to prepare adequately. *See Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127, 129 and n. 7 (3d Cir. 1980). However, because the Court does not at this time enter final judgment on any issue to which any affidavit pertains, or could possibly pertain, *compare Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980), the Court has proceeded to dispose of certain issues solely on the pleadings. In sum, those claims that will be dismissed involve issues that have been resolved without affidavits, and thus the procedure remains within the scope of a motion to dismiss. Consequently, notice to the parties is not required.

[4] Those portions of the facts that do not pertain to the jurisdiction and venue issues are presented so that all of the plaintiffs' allegations and affidavits are taken as true. *Mortensen v. First Federal Sav. and Loan Ass'n.*, 549 F.2d 884, 891 (3d Cir. 1977). In addition, all inferences that are favorable to the plaintiffs have been drawn from the record. *Id.*

WILMINGTON HOUSE

1. *Factual Background*

Wilmington House was a limited partnership organized and existing under the laws of the State of Maryland. Wilmington House was formed solely for the purpose of acquiring Lancaster Court, another limited partnership, which owned and operated a 324 unit garden apartment complex in Wilmington, Delaware. The general partners of Wilmington House were Lee P. Der, Inc., a Maryland corporation, and David E. Karr, a Maryland attorney. The sole shareholder of Lee P. Der, Inc., was Lee P Der (hereinafter "Der"), a natural person residing in Baltimore County, Maryland.

In early October, 1977, Der[5] offered to sell to the plaintiffs John T. Hill, Descomp, Inc., Virgil Scott, Marie Scott, Thomas Ruger, and Patricia Ruger (collectively "Wilmington House plaintiffs"), limited partnership interests in Wilmington House. As a result of Der's solicitations, Descomp, Inc., Virgil and Marie Scott, and Thomas and Patricia Ruger purchased Wilmington House limited partnership shares in November, 1977. Similarly, John T. Hill purchased a share in December, 1977. The limited partnership agreement required each plaintiff to make a cash down payment towards the purchase price. The agreement further provided that additional installment payments were to be made.[6] Each of these

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[5] Actually several people allegedly offered to sell the partnership interests to these plaintiffs. These people have been sued by the plaintiffs in a related action, *Hill v. Der, et al.*, 521 F.Supp. 1370 (D.Del 1981). The plaintiffs specifically mention D & S Financial, Inc., a Maryland broker-dealer corporation controlled by Der, as the offeror. For convenience, however, the Court will refer to Der as being the representative of all these people, even though others may have acted similarly.

[6] The payments were to be made on May 1, 1978, February 1, 1979, February 1, 1980, and February 1, 1981.

installment payments was to be secured by irrevocable letters of credit drawn for the benefit of Wilmington House.

Der suggested to the Wilmington House plaintiffs that they apply to the defendant Equitable for the required letters of credit. The Wilmington House plaintiffs did apply to Equitable and subsequently they received the desired letters of credit. On information and belief, the plaintiffs allege that certain officers of Equitable, most notably Stephen Meszaros, approved the plaintiffs' letter of credit application because Der bribed them to do so. When Equitable allegedly discovered the perfidy of its employees, it discharged them. Equitable, however, never informed the plaintiffs of the bribes, nor of the subsequent discharge of the bribed employees.

The Amended Complaint filed in *Hill v. Der*, 521 F. Supp. 1370, indicates that the Wilmington House venture encountered difficulties as early as December, 1977. The plaintiffs first learned of the acuity of these problems in early February, 1979, but Der allayed the plaintiffs' fears. In April, 1979, however, the plaintiffs received further information that led them to realize the severity of the financial problems of Wilmington House. Nevertheless, the plaintiffs continued to make the required installment payments, up to and including that of February 1, 1980.

Subsequently, the venture apparently failed completely and the Wilmington House plaintiffs sued Der and his alleged associates. In connection with that suit, John T. Hill wrote to Equitable on March 9, 1981, generally inquiring into the issuance of the letters of credit and specifically asking whether any Equitable employees were discharged as a result of the issuance of said letters. In an April 27, 1981 reply letter, Equitable Vice President and Counsel Martin B. Ellis informed Hill that there were no irregularities concerning the issuance of the let-

ters of credit, and further that no employees were dismissed or asked to resign because of this matter.

On March 17, 1981, Virgil Scott wrote a letter to Equitable on behalf of Descomp, Inc., making further inquiries into the issuance of the letters of credit. In a letter of April 27, 1981, Martin B. Ellis similarly informed Mr. Scott that there were no irregularities or employee discharges in connection with the issuance of the letters of credit.

On March 20, 1982, Thomas Ruger received a telepone call from Martin E. Mason, a defendant in *Hill v. Der, et al.*, 521 F. Supp. 1370, in which Mason allegedly informed Ruger that Der had provided kickbacks to employees of Equitable in connection with Wilmington House. Shortly thereafter Ruger, along with Virgil Scott, met with Mason who allegedly informed them of some of the specifics of the kickback scheme. Subsequently, this action was filed against Equitable on April 30, 1982.

2. *Jurisdiction and Venue*

A. *Jurisdiction*

A threshold issue is whether Equitable is amenable to suit in Delaware. Fed. R. Civ. P. 4(e) permits service of process upon a party not an inhabitant of or found within the state by any method permitted by state statute or court rule. Consequently, in this federal question case, the propriety of service and exercise of jurisdiction is measure under 10 *Del.C.* § 3104(c)(4). Section 3104 (c)(4) provides:

> (c) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or his personal representative, who in person or through an agent:

> (4) Causes tortious injury in the State or outside of the State by an act or omission outside of the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State, or derives substantial revenue from services, or things used or consumed in the State. . . .

Equitable does not contest that the plaintiffs' statutory claims constitute allegations of tortious injury as that term is used in Section 3104(c)(4). *See Magid v. Marcal Paper Mills, Inc.*, 517 F. Supp. 1125, 1130 (D. Del. 1981) (and cases cited therein). Consequently, Equitable is amenable to suit in this case if it either (1) conducts a substantial volume of business in Delaware; *or* (2) persistently engages in conduct in Delaware. *Id.*[7] It is beyond peradventure that Equitable's activities in Delaware satisfy both these requirements, and therefore the exercise of jurisdiction is proper.

There are many factors which indicate that Equitable has a substantial jurisdictional presence in Delaware. First, an Equitable affiliate that handles Equitable's credit card operations, Equitable Bank of Delaware, is located in Delaware. Equitable Bank of Delaware services the credit card customers of Equitable.[8] Under Sec-

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[7] 8 *Del.C.* § 382 is another means by which this Court could acquire jurisdiction in this case. The requirements of 8 *Del.C.* § 382 are stricter, however, than those of 10 *Del.C.* § 3104(c)(4). Section 382 not only requires that the defendant transact business generally in Delaware, it also requires that the civil action in question arise or grow out of the business conducted in this state. *See Simpson v. Thiele, Inc.*, 344 F.Supp. 7, 8 (D.Del. 1972). 10 *Del.C.* § 3104(m)(4) does not have this second requirement and is therefore an expansion beyond § 382. *Magid v. Marcal Paper Mills, Inc.*, 517 F.Supp. at 1129. Consequently, if suit is not proper under Section 3104(c)(4), it is similarly improper under Section 382.

[8] The exact nature of the relationship between Equitable and Equitable Bank of Delaware has not been established, although Equitable has not challenged plaintiffs' assertion that the Delaware affiliate services Equitable's credit card customers. In addition, the

tion 3104(c)(4), if Equitable Bank of Delaware is an agent of Equitable in Delaware, then Equitable is amenable to suit in Delaware. *See Jayne v. Royal Jordanian Airlines Corp.*, 502 F. Supp. 848, 856-57 (S.D. N.Y. 1980) (applying New York law).

The record is not adequately developed for this Court to hold that Equitable is amenable to suit in Delaware simply because Equitable Bank of Delaware is its agent in this State. *See LaChemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 603 (D. Del. 1971) (proof of agency must be clear before subsidiary's acts attributable to parent), *aff'd*, 487 F.2d 312 (3d Cir. 1973). It may well be if the Court ordered additional jurisdictional discovery, an agency relationship could be established. In light of Equitable's other substantial contacts with Delaware, however, it is unnecessary to predicate jurisdiction solely on the acts of Equitable Bank of Delaware. It is sufficient to state that the activities of Equitable Bank of Delaware constitute a significant major contact of Equitable in Delaware. *See Perry v. American Motors Corp.*, 353 A.2d 589, 592-93 (Del. Super. 1976).

Equitable also maintains banking relationships with several Delaware banks. From at least 1978-1982, the Wilmington Trust Company and the Delaware Trust Company have performed check clearing and wire transfer services on a continuing basis for Equitable. Equitable also has maintained bank accounts with these two banks continuously from at least 1978-1982. In addition, Equitable maintained a $700,000 certificate of deposit with the Wilmington Savings Fund Society from 1978-1980 as part of a mutual relationship between Equitable and that bank pertaining to reserve requirements.

Court takes judicial notice that many major out-of-state banks service their credit card customers through Delaware affiliates or subsidiaries in order to benefit from this State's liberal laws regarding credit card finance charges.

Furthermore, Equitable has engaged in various commercial loan participations in Delaware during the relevant time period. For example, Equitable currently participates in three mortgage participations with the Sussex Trust Company, a Delaware bank. The aggregate amounts of the mortgages is near $500,000 and they provide Equitable with income of about $50,000. In addition, because of their proximity to Delaware, Equitable branch offices have likely made loans to Delaware residents. It is certain that Equitable has had interests in property located in Delaware. *See Equitable Trust Co. v. O'Neill*, 420 A.2d 1196, 1198 (Del. Super. 1980). Equitable also has engaged in litigation in this State concerning its Delaware financial affairs, and has benefited from the Delaware-court system. *Id.* In sum, Equitable has involved itself in regular business and legal relations within Delaware.

Equitable's only apparent argument that these substantial and persistent contacts with Delaware are insufficient to sustain jurisdiction is that these contacts do not constitute a substantial part of Equitable's business.[9] The mere fact that Equitable's Delaware contacts may provide it with only a small portion of its total income, however, is not decisive. Generally speaking, the appropriate inquiry under Section 3104(c)(4) is whether Equitable, in absolute dollar amounts, "derives substantial revenue" from Delaware. *See, e.g., Plumb v. Cottle*, 492 F. Supp. 1330, 1334 (D. Del. 1980), ($34,000 and $21,000 in income in 1978 and 1979 respectively, which constitute 3% and 2% of yearly income respectively, is substantial revenue for purposes of Section 3104(c)(4)). Consequently, even if the Court considered only Equitable's income derived from the mortgage participations ($50,000), such income likely would be sufficiently substantial to satisfy the requirements of Section 3104 (c)(4). As already has been discussed, however, Equi-

[9] Reply Memorandum of Defendant Equitable Bank, N.A. at 3.

table engages in many other ventures in Delaware beyond the mortgage participations. Therefore, it is clear that Equitable "derives substantial revenue" from Delaware that makes it amenable to suit in Delaware pursuant to 10 *Del.C.* § 3104(c)(4).

Furthermore, even if the Court accepted Equitable's contention that its revenue derived from Delaware is insubstantial, Section 3104(c)(4) provides for jurisdiction if the deefndant's conduct is persistent or regular in Delaware, irrespective of the substantiality of the revenue derived from the State. *Magrid v. Marcal Paper Mills, Inc.*, 517 F. Supp. 1125, 1130 (D. Del. 1981). As was previously stated, many of Equitable's activities in Delaware were persistent, regular, and continuous from at least 1978 to 1982. Consequently, Equitable is amenable to suit on this alternate prong of Section 3104(c)(4), notwithstanding Equitable's argument pertaining to substantiality. Therefore, the Court finds that service of process was proper under Section 3104(c)(4) and consequently that jurisdiction is also appropriate.

B. *Venue*

Equitable also argues that venue is improper in Delaware under 12 U.S.C. § 94, the venue requirements for suits against national banking associations.[10] Former

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[10] Equitable has also argued that venue is improper under the securities laws, Section 22(a) of the 1933 Act (15 U.S.C. § 77v(c)) and Section 27 of the 1934 Act (15 U.S.C. § 78aa). The provisions of the sections are largely co-extensive and the somewhat broader provisions of the 1934 Act apply to all the claims. *Puma v. Marriott*, 294 F.Supp. 1116, 1120-1121 (D.Del. 1969). Section 27 provides for venue in any district where the defendant transacts business. For the same reasons discussed concerning jurisdiction, venue is also appropriate because Equitable "transacts business" in Delaware as required under Section 27. *See Livingston v. Weis, Voisen, Cannon, Inc.*, 294 F.Supp. 676, 681 (D.N.J. 1968); *see also United Industrial Corp. v. Nuclear Corp. of America*, 237 F.Supp. 971, 978-979 (D.Del. 1964).

Section 94 [11] provided:

> Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Although this provision arguably could preclude suit in this district, it is clear that it has no bearing on the present case.

The factual circumstances governing issues of venue are determined as of the time the complaint was filed, *Lee v. Hunt*, 410 F. Supp. 329, 332 (M.D. La. 1976); *see Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*, 230 F.2d 511, 512 (3d Cir. 1956), or perhaps as of the time the cause of action arose. *Board of County Commissioners v. Wilshire Oil Co. of Texas*, 523 F.2d 125, 131 (10th Cir. 1975). Equitable was not a national banking association at either the time the complaint was filed or when the cause of action arose.[12] Consequently, the fact that Equitable later became a national bank does not make the provisions of former Section 12 U.S.C. § 94 applicable.

Furthermore, 12 U.S.C. § 94 has been amended.[13] Section 94 now provides:

> Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as re-

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[11] Section 94 was amended effective October 15, 1982. 96 Stat. 1512 (P.L. 97-320). The above quoted statute was in effect at the time this action was commenced.

[12] *See* footnote 1, *supra*.

[13] *See* footnote 11, *supra*.

> ceiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located, or, in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association's principal place of business is located.

96 Stat. 1512 (P.L. 97-320). This new venture provision repeals the requirements of former Section 94 except in cases involving a closed bank or a Federal Deposit Insurance Corporation receivership.

Absent special circumstances which are not present in this case, the amended version of Section 94 controls the venue issue presently before the Court. *See Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 563, 87 S.Ct. 1746, 1750, 18 L.Ed.2d 954 (1967). Tested under the amended version of Section 94, venue would be proper in Delaware in this case even if Equitable is considered a national bank. Consequently, the Court finds that the provisions of 12 U.S.C. § 94 do not preclude suits in this jurisdiction.

3. *Statute of Limitations on the Securities Laws Claims*

Equitable's next argument is that this case should be dismissed against it because plaintiffs' securities laws claims are barred by the applicable statute of limitations.[14] Various federal and state statute of limitations

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[14] Statute of limitations issues have not been raised concerning the pendent state law claims. It is Equitable's position that if the plaintiffs' federal securities laws claims are dismissed, the pendent claims must be dismissed for lack of subject matter jurisdiction. The Court concurs with Equitable on this point. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

are proffered as controlling plaintiffs' claims. The issue is further complicated in that plaintiffs have alleged numerous violations of different portions of the securities laws, each with a different applicable limitations period, all in Count I.

A. *Plaintiffs' Claims Under Section 10(b) Of The 1934 Act and Rule 10b-5.*

Initally, the Court must determine the proper statute of limitations to apply to the 10b-5 claims. Although the federal securities laws contain explicit limitations provisions for those sections which expressly create civil remedies, there is no federal statute of limitations for an implied action under Rule 10b-5. *Hill v. Der*, 521 F. Supp. 1370, 1379 (D. Del. 1981). Consequently, the timeliness of a suit alleging violations under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder is determined by reference to the most closely analogous state law limitations period of the forum state, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29, 96 S.Ct. 1375, 1389 n.29, 47 L.Ed.2d 668 (1976), including any "borrowing statute." *See Robertson v. Seidman & Seidman*, 609 F.2d 583, 586 (2d Cir. 1979); *Arneil v. Ramsey*, 550 F.2d 774, 779 (2d Cir. 1977); *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 612 (S.D.N.Y. 1980).

The Delaware "borrowing statute," 10 *Del.C.* § 8121 provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resi-

dent of this State, the time limited by the law of this State shall apply.

Four of the Wilmington House plaintiffs, Virgil Scott, Marie Scott, Thomas Ruger, and Patricia Ruger are Pennsylvania residents. The remaining Wilmington House plaintiffs, John T. Hill and Descomp, Inc.[15] are Delaware residents. By its terms, the borrowing statute is inapplicable to the plaintiffs Hill and Descomp, Inc. because of their Delaware residency. The borrowing statute may be applicable to the 10b-5 claims of the Scotts and Rugers, however, if their cause of action arose outside of Delaware. If the plaintiffs' cause of action arose outside of Delaware, a different statute of limitations will apply to the 10b-5 claims of the non-Delaware residents as opposed to the Delaware residents. Therefore, the Court will first decide the applicable statute of limitations for the 10b-5 claims of the non-Delaware residents, and then proceed to determine the applicable limitations period for the Delaware plaintiffs.

(i) Virgil Scott, Marie Scott, Thomas Ruger and Patricia Ruger (Pennsylvania residents)

The litigants agree that the 10b-5 claims of the Scotts and Rugers (collectively "non-resident plaintiffs") are governed by reference to the applicable statute of limitations of the state where their cause of action arose under 10 *Del.C.* § 8121. *See Robertson v. Seidman & Seidman*, 609 F.2d at 586. The non-resident plaintiffs contend, however, that their cause of action arose in Delaware and therefore Delaware limitations law applies. The defendants conversely argue that the plaintiffs' cause of action arose in Maryland and therefore the non-resident plaintiffs' claims are governed by the limitations law of Mary-

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[15] Descomp, Inc. is incorporated in Delaware and has its principal place of business in Bear, Delaware. For purposes of the borrowing statute, it is a Delaware resident. *See D'Angelo v. Petroleos Mexicanos*, 398 F. Supp. 72, 79 (D. Del. 1975).

land. Into this controversy the Court at oral argument interjected the possibility that the limitations law of Pennsylvania, the state where the Scotts and Rugers reside, may govern the non-resident plaintiff's claims. Consequently a determination of which statute of limitations governs the non-resident plaintiffs' 10b-5 claims may be accomplished only by deciding where the non-resident plaintiffs' claims arose for purposes of 10 *Del.C.* § 8121.

In determining where the plaintiffs' cause of action arose for purposes of Section 8121, the Court must make a similar analysis to that made when making a substantive choice of law decision. *Dymond v. National Broadcasting Co., Inc.*, 559 F.Supp. 734 at 737, (D.Del.1983); *see also Sack v. Low*, 478 F.2d 360, 365 (2d Cir.1973). Delaware courts, when confronted with a substantive choice of law situation in a tort action will apply the law of the *lex loci delecti*, *i.e.*, the law of the state where the tort or injury occurred. *Dymond v. National Broadcasting Co., Inc.*, at 737; *Thornton v. Carroll*, 490 F. Supp. 455, 457 (D.Del.1980). In contract cases, however, the Delaware courts have abandoned the older *lex loci delecti* standard and have utilized the more modern and flexible "most significant relationship to the transaction" test set forth in the *Restatement (Second) Conflict of Laws* § 188(1). *See Process and Storage Vessels, Inc. v. Tank Service, Inc.*, 541 F.Supp. 725, 729 (D.Del.1982); *Sellon v. General Motors Corp.*, 521 F.Supp. 978, 981 (D.Del.1981); *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1166 (Del.1978). The plaintiffs' statutory cause of action arising under 10b-5 is not clearly a tort or contract action for choice of law purposes, and indeed involves elements of both.[16] It is irrelevant, however, whether the court applies the *lex loci delecti* or the "most significant relationship" test for purposes of the borrowing statute because in either case

[16] The action relates to both fraud (tort) and a contract for the sale of securities.

Maryland limitations law will govern the non-resident plaintiffs' claims.

In a traditional *lex loci delecti* analysis, the injury occurs not where the wrong takes place but rather where the wrong caused the injury or loss. *See Autrey v. Chemtrust Industries Corp.*, 362 F.Supp. 1085, 1090 (D.Del. 1973). This is so because injury is the last act necessary for a cause of action to arise. *See George v. Douglas Aircraft Co.*, 332 F.2d 73, 79 (2d Cir.), *cert. denied*, 379 U.S. 904, 85 S.Ct. 193, 13 L.Ed.2d 177 (1964). Consequently, it has been held that in an action for fraud under 10b-5, the cause of action arises where the economic impact is felt, normally where the plaintiff resides. *Arneil v. Ramsey*, 550 F.2d 774, 779 (2d Cir.1977), *quoting Sack v. Law*, 478 F.2d 360, 366 (2d Cir.1973). This rigid application of the *lex loci delecti* test, which would require that the non-resident plaintiffs' claims be governed by Pennsylvania limitations law (their place of residence), has been found inapplicable by this Court in the companion case to the one *sub judice*. *See Hill v. Der*, 521 F.Supp. at 1378 n. 5.

There are sound reasons why this Court did not apply Pennsylvania limitations law to the non-resident plaintiffs' 10b-5 claims. The application of the place of injury rule under Delaware choice of law principles is appropriate only in the case of negligent torts. *Johnston Associate, Inc. v. Rohm & Haas Co.*, 560 F.Supp. 916, at 918, (D.Del.1983); *see Marra v. Bushee*, 317 F.Supp. 972, 974 (D.Vt.1970), *aff'd in reelvant part, reversed in part*, 447 F.2d 1282, 1283 (2d Cir.1971). In the case of intentional torts, Delaware courts have preferred to apply the law of the defendant's place of conduct rather than the place of injury.[17] *Johnston Associates, Inc.*, at 918; *accord*, *Marra v. Bushee*, 447 F.2d 1282, 1283 (2d

[17] To the extent a 10b-5 action is equivalent to a tort, it must be considered an intentional tort because of the scienter requirement. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 135, 193, 96 S.Ct. 1375, 1380, 47 L.Ed.2d 668 (1976).

Cir.1971). This distinction is made because when the compensatory element is dominant, as it is in the ordinary negligence action, the place of the injury rule is appropriate. However, in an intentional tort action, where this compensatory factor is secondary and the punitive element is dominant, "a state finds conduct wrongful because its people regard it as sinful or offensive to public morals, and the conduct, not the injury, is critical for applying the applicable law." *Marra v. Bushee*, 317 F.Supp. at 974. Consequently, the Court finds that under the *lex loci delecti* test, the cause of action arose in this case at the primary place of the defendants' wrongful conduct. *Johnston Associates, Inc.*, at 918; *see Hill v. Der*, 521 F.Supp. at 1378 n. 5, *cf.*, *Marra v. Bushee*, 447 F.2d 1282, 1283 (2d Cir.1971).

There can be no doubt that the primary place of Equitable's wrongful conduct was Maryland. The gravamen of the plaintiffs' complaint against Equitable is twofold. First, the plaintiffs' allege that Equitable employees were bribed to approve loans to the plaintiffs in connection with their investment in Wilmington House. Second, the plaintiffs' claim that Equitable wrongfully failed to disclose to the plaintiffs that said employees accepted such bribes.

Plaintiffs admit that Equitable made the loans in question in Maryland.[18] The plaintiffs also admit that Equitable accepted repayment of the loans in Maryland.[19] In addition, because the nature of the plaintiffs' claim is based upon Equitable's failure to disclose, such failure can be said to occur only where the bank is located, which is also Maryland. In sum, Maryland limitations law should apply because most, if not all, of Equitable's alleged wrongful conduct occurred in Maryland.

The choice of Maryland limitations law is even more compelling under the "most significant relationship" test

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[18] Plaintiffs' Brief at 17.

[19] Plaintiffs' Brief at 17.

set forth in the *Restatement (Second) Conflict of Laws* § 188(1) at 575 (1971). *See Process and Storage Vessels, Inc. v. Tank Service, Inc.*, 541 F.Supp. at 729. Section 188(1) provides in relevant part:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties. . . .

Application of the *Restatement* test reveals clearly that Maryland has a greater interest than Delaware or Pennsylvania in the resolution of the plaintiffs' claims. *See Sellon v. General Motors Corp.*, 521 F.Supp. at 982 (law of state with larger stake in legal issues should govern).

As previously stated, both the loans and the repayment of the loans were made in Maryland. In addition, Equitable's alleged failure to disclose occurred in Maryland. Furthermore, Equitable's principal place of business is in Maryland, and Maryland has a substantial interest in the conduct of banks located within the state. *See also Restatement (Second) Conflict of Laws*, § 188(2(e) at 575 (1971).

In addition to the direct activities of Equitable, many other factors point to Maryland as the proper choice of law under a most significant relationship test. For example, the money Equitable loaned to the plainitffs was invested in Wilmington House, a Maryland limited partnership. The general partners of Wilmington House were Lee P. Der, Inc., and David E. Karr, both Maryland residents. The broker-dealer that offered the limited partnerships was D & S Financial, also a Maryland corporation. In short, the underlying investment for which the Equitable loan was used was principally a Maryland investment promoted by Maryland residents.

In response to these numerous factors which point toward the application of Maryland limitations law, the plaintiffs offer two arguments. First, the plaintiffs prop-

erly state that the court in *Hill v. Der* found that the plaintiffs' claims in that case arose in Delaware. 521 F. Supp. at 1378 n. 5. Consequently, because the same securities are at the core of this case as in *Hill v. Der*, the plainitffs argue that Delaware law is applicable. The obvious flaw in the plaintiffs' argument is that the defendants in *Hill v. Der* are not the same as in this case. In the instant case, two Maryland banks are defendants, and this changes the choice of law calculus. Therefore, the fact that Delaware limitations law applied in *Hill v. Der* is irrelevant in deciding the current issue.

The second argument the plaintiffs make in support of a Delaware choice of law is that some of the actions pertaining to the plaintiffs' claims occurred in Delaware, and the result of Equitable's misconduct impacted in Delaware. Although the affidavits of Thomas Ruger and Virgil Scott indicate that some events relating to this case took place in Delaware, such events constituted an insignificant part of the overall relationship between the plaintiffs and Equitable. Furthermore, the place where Equitable's actions impacted is not determinative in a choice of law decision, and indeed under the Court's *lex loci delecti* analysis is irrelevant.[20] Therefore, the Court holds that Maryland limitations law will govern the 10b-5 claims of the plaintiffs Virgil and Marie Scott and Thomas and Patricia Ruger.

In determining which Maryland limitations law to borrow, the Court must bear in mind the purpose of the Delaware borrowing statute. 10 *Del.C.* § 8121 was enacted to prevent forum shopping. *Dymond v. National Broadcasting Co., Inc.*, at 736; *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 57 (Del.1957). Therefore, the plaintiffs' 10b-5 claims should be cognizable in Delaware only

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[20] In any event, if impact analysis was appropriate, it would point to a Pennsylvania choice of law result for the non-resident plaintiffs, not Delaware. *See*, p. 1334, *supra*. This result was rejected in *Hill v. Der*, 521 F. Supp. at 1378 n.5.

if they could have been brought in Maryland. Consequently, this Court must apply the same statute of limitations to the non-resident plaintiffs' 10b-5 claims as would have been applied to such claims had they been brought in Maryland. *See Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 612-613 (S.D.N.Y.1980).

In Maryland, the statute of limitations found in Maryland's Blue Sky law, Md. Corps. & Ass'ns. Code Ann. § 11-703(f), is applied to actions arising under Section 10(b) and Rule 10b-5. *O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir.1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981). Section 11-703(f) provides:

> (1) A person may not sue under this section after the earliest to occur of three years after the contract of sale or purchase or the time specified in paragraph (2) of this subsection.
>
> (2) An action may not be maintained:
>
> (i) To enforce any liability created under subsections (a)(1)(i) or (a)(2)(i) of this section, unless brought within one year after the violation on which it is based; or
>
> (ii) To enforce any liability created under subsections (a)(1)(ii) or (a)(2)(ii) of this section, unless brought within one year after the discovery of the untrue statement or omission, or after the discovery should have been made by the exercise of reasonable diligence.

Thus, a 10b-5 action in Maryland may not be brought later than one year after a reasonable date of discovery or three years after the contract of sale, whichever occurs first. *See O'Hara v. Kovens*, 625 F.2d at 17. This limitations criteria will apply to the non-resident plaintiffs' 10b-5 claims against Equitable as they relate to the Wilmington House transaction.[21]

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[21] A similar result was recently reached by Judge Stapleton in *Dofflemeyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del.

(ii) John T. Hill and Descomp, Inc.

Delaware limitations law will govern the 10b-5 claims of the Delaware residents, Hill and Descomp, Inc., against Equitable. *Ernst & Ernst v. Hochfelder*, 425 U.S. at 210 n. 29, 96 S.Ct. at 1389 n. 29. In determining which limitations period to apply, the Court is faced with two alternative choices. The first alternative is to apply the two-year limitations period that governs actions under the Blue Sky laws, set forth at 6 *Del.C.* § 7323(e). The second alternative is to apply the statute of limitations for fraud set forth at 10 *Del.C.* § 8106, which provides for a three-year period. Although most Circuit Court of Appeals have firmly established which of these alternatives govern a 10b-5 claim, *compare Clegg v. Conk*, 507 F.2d 1351, 1353 (10th Cir.1974) (statute of limitations for fraud applies), *cert. denied*, 422 U.S. 1007, 95 S.Ct. 2628, 45 L.Ed.2d 669 (1975); *United California Bank v. Salik*, 481 F.2d 1012, 1915 (9th Cir.) (same), *cert. denied*, 414 U.S. 1004, 94 S.Ct. 361, 38 L.Ed. 2d 240 (1973), *with O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir.1980) (statute of limitations for Blue Sky actions applies), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C.Cir.1977) (same); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d

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1983). In *Dofflemeyer*, the Court analyzed the affect of the borrowing statute on a 10b-5 claim arising in California and concluded that the provisions of Cal. Civ. Proc. Code § 338(4) (limitations period for fraud) would apply. At 378-379. The result in *Dofflemeyer* is in accord with the result reached in this case because the Ninth Circuit Court of Appeals, contrary to the Fourth Circuit in *O'Hara v. Kovens*, has held that the statute of limitations for fraud governs 10b-5 actions arising in California and not the limitations period provided for in the Blue Sky laws. *See United California Bank v. Salik*, 481 F.2d 1012, 1015 (9th Cir.), *cert. denied*, 414 U.S. 1004, 94 S.Ct. 361, 38 L.Ed.2d 240 (1973). In all cases, the proper application of the Delaware borrowing statute requires the Court to borrow the statute of limitations that would govern the 10b-5 action where it arose. *See Gluck v. Amicor, Inc.*, 487 F. Supp. at 612-613.

123, 126 (7th Cir.1972) (same); *Vanderboom v. Sexton*, 422 F.2d 1233, 1237-1239 (8th Cir.) (same), *cert. denied*, 400 U.S. 852, 91 S.Ct. 47, 27 L.Ed.2d 90 (1970), the approach taken by the United States Court of Appeals for the Third Circuit requires a case by case determination of which limitations period should govern a particular action.

The Third Circuit's approach for selecting the appropriate state statute of limitations in a 10b-5 action is set forth in *Roberts v. Magnetic Metals Co.*, 611 F.2d 450 (3d Cir.1979) and *Biggans v. Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir.1980). Judge Latchum in *Hill v. Der*, 521 F.Supp. at 1379-1385, and Judge Stapleton in *Dofflemeyer v. W.F. Hall Printing Co.*, at 376-377, have fully explored the Third Circuit's approach in *Roberts* and *Biggans*, and it is not necessary for this Court to duplicate that analysis. Judge Latchum has succinctly set forth the guidelines to be followed in this area as follows:

> It is safe to assume that the Third Circuit adheres to the rudimentary principle that when alternative limitations period are supplied by state law, the court must select the state statute of limitations which best comports with the substantive federal policies advanced by Rule 10b-5. Likewise the Court of Appeals has indicated that the concurrent operation of the federal and state securities statutes makes the Blue Sky statute of limitations in most cases the logical candidate for regulating 10b-5 claims. This presumption, however, is subject to one significant exception. If the underlying state Blue Sky law does not afford a civil damage action to remedy the behavior challenged by the 10b-5 claim and the plaintiff would be relegated to a common law fraud action for state relief, the courts must apply the fraud limitations provisions to the 10b-5 action.

Hill v. Der, 521 F.Supp. at 1383 (citations omitted). Similarly, Judge Stapleton has concluded:

> It is clear from these two cases (*Roberts* and *Biggans*) that where a plaintiff has no remedy under the state's Blue Sky law, but the operative facts alleged in the complaint give rise to a claim under the state's common law, it is the limitations period applicable to a common law claim rather than the Blue Sky period which governs federal claims under Rule 10b-5.

Dofflemeyer v. W.F. Hall Printing Co., at 377. Consequently, if the operative facts in this case would give rise to a Delaware Blue Sky cause of action, the limitations period under the Blue Sky laws would govern the resident plaintiffs' 10b-5 claim. If the facts do not present an actionable claim under the Blue Sky laws, the statute of limitations period for fraud will control.

The provisions of the Delaware Blue Sky law as drawn in part from the Uniform Securities Statute. The only civil damage remedy available to a private litigant is set forth in 6 *Del.C.* § 7323,[22] which is modeled after

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[22] Section 7323 provides in relevant part:

> (a) Any person who:
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> (2) Offers, sells or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading (the buyer or seller not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the untruth or omission, is liable to the person buying or selling the security from or to him, who may sue either at law or in equity to recover the consideration paid for the security, together with the interest at the legal rate from the date of payment costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security.
>
> (b) Every person who directly or indirectly controls a seller or buyer liable under subsection (a), every partner, officer, or

Section 12(2) of the Federal Securities Act of 1933. *Hill v. Der*, 521 F.Supp. at 1383. Only those persons who "offer, sell, or purchase" the security to the injured person are liable under Section 7323.[23] Furthermore, Section 7323 does not set forth a remedy in damages for a defrauded purchaser or seller, but rather provides only for an action of recision.

In this case, no action would lie against Equitable under the Blue Sky laws because Equitable did not offer any security to the plaintiffs, nor did it sell to or purchase from the plaintiffs any security. Furthermore, an action for recision is similarly inappropriate because the plaintiffs and Equitable did not have a contract for the purchase or sale of securities. Consequently, there is nothing to rescind. Therefore, the Court finds that the operative facts in this case do not give rise to a cause of action under the Delaware Blue Sky laws.

Because the plaintiffs would have no cause of action under the Blue Sky laws, the two-year statute of limitations period provided for in 6 *Del.C.* § 7323(e) is not applicable. *Dofflemeyer v. W.F. Hall Printing Co.*, at

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director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such seller or buyer who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the seller or buyer, unless the nonseller or nonbuyer who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

[23] The language of Section 7323 is more limited than 6 *Del.C.* § 7303, which makes it unlawful for any person "in connection with the offer, sale or purchase" of any security to use fraudulent schemes or devices. Section 7303, which is very similar to Rule 10b-5, does not provide for a civil damage remedy. *Hill v. Der*, 521 F. Supp. at 1383.

377. As such, the Delaware statute of limitations for fraud, 10 *Del.C.* § 8106, governs the 10b-5 claims of Hill and Descomp, Inc. against Equitable. *Id.* Section 8106 provides:

> No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit or credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accuring of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

Under the terms of Section 8106, a three-year statute of limitations period will apply to the 10b-5 claims of Hill and Descomp, Inc. against Equitable.

(iii) Date of the Purchase of Securities

Although the Court has determined the appropriate statute of limitations for both the non-resident and resident plaintiffs, it must still determine when the plaintiffs' cause of action accrued before it can assess the timeliness of the 10b-5 claims contained in Count I. It is clear that under Rule 10b-5, which proscribes fraud "*in connection with* the purchase or sale of any security, the plaintiffs' 10b-5 action against Equitable accrued at the time of purchase of the Wilmington House limited partnership.

In *Hill v. Der*, the Court applied the "investment decision" analysis of *Goodman v. Epstein*, 582 F.2d 388 (7th Cir.1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979) and concluded that under the *Goodman* doctrine the plaintiffs' 10b-5 claim accrued on February 1, 1980, or perhaps as late as January and February of 1981, when the final payments were made to Equitable on the letters of credit.[24] *See Hill v. Der*, 521 F.Supp. at 1385-1387. This ruling was made in connection with the *Hill v. Der* defendants' motion to dismiss made pursuant to Fed.R.Civ.P. 12(b)(6).[25]

The Court in *Hill v. Der* was determining on which date the Wilmington House limited partnerships were purchased and sold. It is in connection with these same partnerships that Equitable allegedly committed the 10b-5 violation. The Court finds the analysis in *Hill v. Der* to be persuasive, and the result to be correct. Consequently, at this juncture it is assumed that the plaintiffs' 10b-5 claim against Equitable relating to Wilmington House arose on February 1, 1980, or perhaps even as late as early 1981.[26] This date is subject to revision upon the full development of the facts in this case.

The Complaint in this case was filed on April 30, 1982. For the Delaware plaintiffs Hill and Descomp, Inc., the Complaint was timely filed under 10 *Del.C.* § 8106.[27]

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[24] Exhibit G to Plaintiffs' Brief.

[25] Because the Court in *Hill v. Der* ruling was made on a motion to dismiss, all the facts alleged on the plaintiffs' complaint were accepted as true, and any inferences favorable to the plaintiffs were drawn. *Hill v. Der*, 521 F. Supp. at 1386. Ultimately, once further facts are developed, it may be found that the plaintiffs' cause of action accrued much earlier.

[26] These early 1981 dates vary for the different plaintiffs. *See* Plaintiffs' Brief at 28 n.13.

[27] The three-year statutory period under Section 8121 means that the action was timely if the cause of action accrued after April 30, 1979.

The situation of the non-resident plaintiffs, however, is somewhat different. As previously rehearsed, the provisions of Md.Corps. & Ass'ns. Code Ann. § 11-703(f) govern the non-resident plaintiffs' 10b-5 claim. Under the perimeters of Section 11-703(f), the plaintiffs' action must be filed within one year after a reasonable date of discovery of the cause of action or three years after the contract of sale, whichever is earlier. *See O'Hara v. Kovens*, 625 F.2d at 17. Although the action was filed within the three year outside limit of Section 11-703(f), it was not filed within one year after the cause of action accrued.[28]

Section 11-703(f) is patterned after Section 13 of the Federal Securities Act of 1933. Section 13, like Section 11-703(f), imposes a standard of reasonable diligence on the part of the plaintiff to discover the fraud, and requires the plaintiff to file suit when the possibility of fraud becomes apparent. *See Ingenito v. Bermec Corp.*, 441 F.Supp. 525, 554 (S.D.N.Y.1977), *quoting Klein v. Shields & Co.*, 470 F.2d 1344, 1347 (2d Cir.1972). At this point, the Court cannot hold as a matter of law that plaintiffs, in the exercise of reasonable diligence, should have known of their 10b-5 claim before April 30, 1981. This issue can be decided only by the trier of facts. *See Kubik v. Goldfield*, 479 F.2d 472, 477 n. 12 (3d Cir. 1973).

Nonetheless, it is incumbent upon the plaintiffs to properly plead why they did not discover the fraud within one year after it occurred. *See Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir.1978) (applying Section 13 of the 1933 Act), *quoting* 3 L.Loss, *Securities Regulation*, Ch. 11C(1)(f)(ii) at 1744 (2d ed. 1961). The plaintiffs in this case have merely stated in conclusory fashion

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[28] The latest possible date that the cause of action accrued for any of the plaintiffs was February 28, 1981. This date is more than one year before April 30, 1982, the date this action was commenced.

that they could not have discovered the fraud until March 20, 1982.[29] This is insuficient to satisfy the pleading requirements under Section 11-703(f). Although the plaintiffs have set forth the time and circumstances when they did learn of the fraudulent conduct, they must also allege in their complaint why discovery was not made earlier. *See Brick v. Dominion Mortgage & Realty Trust*, 442 F.Supp. 283, 292 (W.D.N.Y.1977). In addition, the plaintiffs must set forth the diligent efforts they made to unearth the fraud. *See id.* Consequently, the non-resident plaintiffs' 10b-5 claim against Equitable will be dismissed unless the Complaint is properly amended to satisfy the pleading requirements imposed by Section 11-703(f) of the Maryland Blue Sky law. *See Hill v. Der*, 521 F.Supp. at 1389.

B. *Plaintiffs' Claims Under Sections 15 And 17 Of The 1933 Act And Sections 15 And 20(a) Of The 1934 Act.*

The plaintiffs, in Count I, also allege that Equitable violated Sections 15 and 17 of the 1933 Act and Sections 15 and 20(a) of the 1934 Act. Initially, for reasons more fully explained below, the portion of Count I based upon Section 17 of the 1933 Act and *Section 15 of the 1934 Act* will be dismissed on other grounds. Consequently, there is no need to discuss the statute of limitations applicable to those claims. The only issue, therefore, is whether the claims based upon *Section 15 of the 1933 Act* and Section 20(a) of the 1934 Act are barred under the applicable statute of limitations.

Section 15 of the 1933 Act[30] and Section 20(a) of the

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[29] Complaint ¶ 14 at 4.

[30] Section 15 provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls

1934 Act[31] establish liabilities of controlling persons. In essence these sections make liable persons who exercise control over other persons or entities that violate the securities laws. These provisions make the control person liable to the same extent as the violator that they controlled. *See* 15 U.S.C. §§ 77*o*, 78t(a). For example, if Equitable was found to "control" a party that violated Rule 10b-5, Equitable would be equally liable for that same violation because of Section 20(a).[32]

Liability under both Sections 15 (1933 Act), and 20 (a) (1934 Act) is in reality derivative liability in that it is predicated upon another person's violation of a different provision of the securities laws. Consequently, the statute of limitations that governs a claim under Sections 15 and 20(a) will be the same as the limitations period that governs the claim against the "controlled" person. *See Herm v. Stafford*, 663 F.2d 669, 679 (6th Cir.1981). As the Court in *Herm v. Stafford* stated:

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any person liable under Sections 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist. 15 U.S.C. § 77*o*.

[31] Section 20(a) provides:

Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule of regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. 15 U.S.C. § 78t(a).

[32] The word "control" is used here as that term is understood within the ambit of Section 20(a). *See Sharp v. Lybrand*, 649 F.2d 175, 185 (3d Cir. 1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982).

> Since the liability of the controlling person is joint and several with the controlled person, the same limitations period logically applies to the controlling person.

Id. (citatiion omitted).

The problem at this juncture is that the Complaint is wholly indecipherable as to whom Equitable is supposed to have controlled. Nonetheless, Section 15 limits controlling person liability to violations by the controlled person of either Section 11 or 12 of the 1933 Act (15 U.S.C. §§ 77k, 77*l*). A claim based upon Section 11 or 12 is governed by the limitations period provided for in Section 13 (15 U.S.C. § 77m) of the 1933 Act. Section 13 provides:

> No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered by the public, or under section 12(2) more than three years after the sale.

It is this limitations period that will govern the plaintiffs' Section 15 claim.

It is not possible, however, to determine what limitations period governs the plaintiffs' Section 20(a) claim. Section 20(a) provides for controlling person liability in reference to any violation of the 1934 Act or a rule or regulation promulgated thereunder. 15 U.S.C. § 78t(a). Consequently, the Court cannot determine which limitations period governs this claim until the plaintiffs delin-

eate who Equitable allegedly controlled and what provision of the securities laws that person violated.

Furthermore, the Court is also unable to determine at this point on which date the statute of limitations began to run on the Section 15 and 20(a) claims. First, it is wholly unclear to the Court what the nature of these claims are. Second, the parties have not discussed in their briefs whether or not the *Goodman v. Epstein* "investment decision" doctrine that was adopted in *Hill v. Der* is relevant to claims not rooted in Section 10(b) or Rule 10b-5. The Court will not decide this issue until it becomes clear that the plaintiffs have a viable claim under either Section 15 or 20(a), and the parties have fully briefed this issue. Consequently, the Court must reserve judgment on whether the plaintiffs' claims under Sections 15 and 20(a) are barred by the applicable statute of limitations. The plaintiffs will be given leave to amend their complaint to properly set forth these claims.[33]

EAGLE ASSOCIATES

1. *Factual Background*

Eagle was a limited partnership organized and existing under the laws of the State of Maryland, with its offices in Pikesville, Maryland. Eagle was organized to engage in the leasing of coal lands in Boone County, West Virginia. Eagle also engaged in the mining and selling of coal in Boone County. The general partners of Eagle were Der-Mas, Inc., a Maryland corporation, and Roger W. Ball, a resident of West Virginia. Lee P. Der, a Maryland resident owned 60% of the shares of the general partner Der-Mas, Inc. The remaining 40% of

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[33] In their Complaint, the plaintiffs should plead their claims governed by Section 13 of the 1933 Act in the same manner indicated by the Court for the 10b-5 claims governed by Section 11-703(f) of the Maryland Blue Sky law. *See* pp. 1339-1340, *supra*.

the shares of Der-Mas, Inc. were owned by Martin E. Mason, also a Maryland resident.

In mid-October, 1978, Der[34] offered to sell to the plaintiffs, Data Control North, Inc. (hereinafter "DCN"), Virgil Scott, Marie Scott, Thomas Ruger, and James Stritzinger (collectively "Eagle plaintiffs"), limited partnership interests in Eagle. On November 2, 1978, DCN, Virgil and Marie Scott, and Thomas Ruger purchased limited partnership shares in Eagle. Similarly, on November 30, 1978, James Stritzinger purchased one and one-half shares of Eagle. The limited partnership agreement required each plaintiff to make a cash down payment towards the purchase price. The agreement further provided that additional installment payments were to be made.[35] Each of these installment payments were to be secured by irrevocable letters of credit drawn for the benefit of Eagle.

Prior to November 2, 1978, DCN, Virgil and Marie Scott, and Thomas Ruger applied for and received unsecured loans from Mercantile to finance a portion of their initial subscription payment for their limited partnership interests in Eagle. At the time of the unsecured loan applications, these four plaintiffs also applied to Mercantile for the required letters of credit. Mercantile rejected the plaintiffs' application for such letters. Consequently, because of their failure to obtain the needed letters of credit, these four plaintiffs paid the entire balance due to their partnership interests by March 20, 1979.

Prior to his investment in Eagle, the plainitff James R. Stritzinger applied for and received an unsecured loan

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[34] Again actually several people were allegedly involved in the sale of the partnership interests to the plaintiffs. *See* Complaint Appendix, ¶ 71 at 31. For convenience, Der is referred to singly to represent this group of alleged wrongdoers. *See* footnote 5, *supra*.

[35] The payments were to be made on June 1, 1979 and June 1, 1980.

from Equitable to partially finance the down payment on his limited partnership shares. Also at that time, and again on December 29, 1978, Stritzinger applied for the requisite letters of credit with Equitable. Subsequently, Equitable approved Stritzinger's application, and he received the desired letters of credit drawn in favor of Eagle.

The plaintiffs allege that certain employees of Mercantile, most notably Peter R. Wilkes, accepted bribes from Lee P. Der to approve the plaintiffs' applications for unsecured loans and letters of credit in connection with Eagle. On information and belief, the plaintiffs further allege that sometime after the unsecured loans were approved, certain officials of Mercantile learned of the bribes and therefore refused to issue letters of credit to the plaintiffs. In addition, plaintiffs allege that Mercantile discharged the bribed employees. Mercantile, however, never informed the plaintiffs of the bribes, nor the subsequent discharge of the bribed employees.

The plaintiff Stritzinger similarly claims that Equitable employees accepted bribes from Lee P. Der to approve his unsecured loans and letters of credit. Stritzinger further claims that when Equitable learned of the dishonesty of the bribed employees, said employees were discharged. Equitable never informed Stritzinger of any of these events.

The fate of Eagle is not fully detailed in the record before the Court. It appears, however, that Eagle was not able to sell its coal, nor generate income as expected.[36] In mid-May, 1979, it became apparent to the plaintiffs that their investment in Eagle was not sound.[37] Nonetheless, on June 1, 1979, Stritzinger tendered the re-

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[36] Complaint Appendix, ¶ 80(b) at 35. The Appendix is part of the Complaint through reference. *See* Plaintiffs' Brief at 22.

[37] Complaint Appendix, ¶ 83 at 37.

quired installment payment on his Eagle investment.[38] Subsequently, it appears that Eagle failed, causing substantial losses to these plaintiffs.[39]

In late February 1981, Stritzinger wrote to the Maryland State Bank Commissioner raising questions about the propriety of Equitable's actions in connection with Eagle. The letter was forwarded to Equitable Vice President and Counsel Martin B. Ellis. In a letter of March 10, 1981, Ellis informed Stritzinger that there had been no impropriety or wrongdoing on the part of any Equitable employee in connection with the Eagle transaction.

In a letter of March 13, 1981, Virgil Scott made inquiries to Mercantile concerning the Eagle venture. Specifically, Scott inquired whether any employees of Mercantile were dismissed in connection with the Eagle loans. Mercantile President Bruce P. Wilson responded to Scott's letter, and indicated that no dismissals occurred because of the Eagle transaction. The Wilson letter answered other questions presented by Scott, and generally indicated that nothing abnormal had occurred at Mercantile in connection with the Eagle loans.

On March 20, 1982, Thomas Ruger received a telephone call from Martin E. Mason, a defendant in *Hill v. Der*, in which Mason allegedly informed Ruger that kickbacks had been paid by Der to employees of Mercantile and Equitable in connection with Eagle. Shortly thereafter, Ruger, along with Virgil Scott, met with Mason who allegedly informed them of some of the specifics of the kickback scheme. Subsequently, this action was filed against Mercantile and Equitable on April 30, 1982.

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[38] *Id.*, ¶ 75 at 33.

[39] *Id.*, ¶ 84 at 37.

2. *Statute Of Limitations On the Securities Laws Claims*

A. *DCN, Virgil Scott, Marie Scott, Thomas Ruger*

Mercantile argues that the plaintiffs' securities law claims should be dismissed against it because such claims are barred by the applicable statute of limitations. As was the case with Wilmington House, various federal and state statute of limitations are arguably applicable to the plaintiffs' securities laws claims against Mercantile in connection with Eagle. Once again, the issue is blurred because the plaintiffs have alleged numerous violations of the securities laws in Count V, each with a different limitations period. The Court finds it unnecessary at this time to ascertain which statute of limitations governs the securities law claims in DCN, Virgil and Marie Scott, and Thomas Ruger, however, because such claims are barred under any potentially relevant limitations period.

These plaintiffs claim that the unsecured Mercantile loans were obtained before November 2, 1978.[40] It is undisputed that all these plaintiffs paid in full for their Eagle limited partnerships on or before March 20, 1979.[41] It is also clear that the three year limitations period of 10 *Del.C.* § 8106 provides for the greatest amount of time to bring a cause of action. Assuming *arguendo* that Section 8106 governs all of the plaintiffs' securities laws claims against Mercantile,[42] this case must have been brought by March 20, 1982. The Complaint, however, was not filed until April 30, 1982. Consequently, the claims against Mercantile are time barred unless the principle of equitable tolling is applied.

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[40] Complaint Appendix ¶ 78(c) at 34.

[41] Complaint Appendix ¶ 78(c) at 34.

[42] This of course is not possible for the claims not relating to Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder.

Equitable tolling is a principle that delays the running of the statutory period when a party injured by fraud remains in ignorance of the fraud without any fault or want of diligence on his part. *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946), *quoting Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874). In this case, the plaintiffs' claims are time barred if the limitations period began to run on March 20, 1979. Consequently, the plaintiffs must allege and prove that the defendant took positive steps after the commission of the initial fraud to keep it concealed. *See Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir.1975). This type of fraudulent concealment tolls the limitations period until the plaintiffs actually discover the fraud, which arguably was after March 20, 1979 and within the statutory period. *See, id.*

Although the plaintiffs argue that the doctrine of equitable tolling applies to their claims, they are obligated to properly plead the circumstances supporting the claim that the defendant concealed their cause of action. *See Hill v. Der*, 521 F.Supp. at 1387. Here the complaint merely states in conclusory fashion that the plaintiffs could not have known of the cause of action before March 20, 1982.[43] This is grossly inadequate to support the contention that Mercantile concealed the plaintiffs' cause of action. Failure to plead the essential facts supporting fraudulent concealment is fatal to plaintiffs' securities laws claims against Mercantile. *Cf., Kroungold v. Triester*, 407 F.Supp. 414, 419 (E.D.Pa.1975). Accordingly, if equitable tolling is to preserve their claims, the plaintiffs must amend their complaint to include specific factual allegations of fraudulent concealment on the part of Mercantile.

As an additional point, although it is clear that equitable tolling applies to the 10b-5 claims, *see, e.g., Tomera*

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[43] Complaint ¶ 14 at 4.

v. Galt, 511 F.2d 504, 509 (7th Cir.1975); *Hill v. Der*, 521 F.Supp. at 1387, it is by no means clear that it applies to the claims governed by the limitations period provided for in Section 13 of the 1933 Act. There is a split of authority on this issue, with the decided weight of case law against the application of equitable tolling under Section 13. *Compare SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir.1982) (no equitable tolling); *Engl v. Berg*, 511 F.Supp. 1146, 1150-1151 (E.D.Pa. 1981) (same); *Brick v. Dominion Mortgage & Realty Trust*, 442 F.Supp. at 289-291 (same), *with In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 337, 344-45 (N.D.Okl.1975) (equitable tolling applies); *Dyer v. Eastern Trust and Banking Co.*, 336 F.Supp. 890, 901-902 (D.Maine 1971) (same). The Court will not decide this particular issue until it is clear that the plaintiffs have cognizable claims governed by Section 13, and the parties have fully briefed the issue.

B. *James Stritzinger*

Equitable has also argued that Stritzinger's securities law claims in connection with Eagle are barred under the applicable statute of limitations. The Court concludes that such claims are not barred.

(i) Section 10b and Rule 10b-5 Claims.

Stritzinger is a resident of Delaware. Consequently, Delaware limitations law will govern the 10b-5 claims against Equitable. *Ernst & Ernst v. Hochfelder*, 425 U.S. at 210 n. 29, 96 S.Ct. at 1389 n. 29. For the same reasons set forth for the 10b-5 claims of John T. Hill and Descomp, Inc., Stritzinger's 10b-5 claim against Equitable is governed by the three year limitations period of 10 *Del.C.* § 8106.[44]

It appears from the Complaint that Stritzinger paid additional monies towards his Eagle investment on June

[44] *See* pp. 1337-1339, *supra*.

1, 1979.[45] Follcwing the "investment decision" analysis discussed previously,[46] the Court finds that this is the date Stritzinger's 10b-5 cause of action arose for purposes of this motion. This date is subject to revision upon the full development of a factual record. Consequently, because this action was filed before June 1, 1982, Stritzinger's 10b-5 claim is not time barred.

(ii) Claims Under Sections 15 and 17 Of The 1933 Act and Sections 15 And 20(a) Of The 1934 Act.

In Count V, Stritzinger also alleges that Equitable violated Sections 15 and 17 of the 1933 Act and Sections 15 and 20(a) of the 1934 Act. For reasons more fully explained below, the claims based upon Section 17 of the 1933 Act and *Section 15 of the 1934 Act* will be dismissed on other grounds. Therefore, the only issue is to determine which statute of limitations governs the claims based upon *Section 15 of the 1933 Act* and Section 20(a) of the 1934 Act.

For the same reasons stated earlier, the Court holds that Section 13 of the 1933 Act is the applicable statute of limitations for Stritzinger's statute of limitations for Stritzinger's Section 15 claim.[47] The Complaint must be amended, however, to conform to the requirements of Section 13.[48]

It is not possible for the Court to determine what limitations period governs Stritzinger's 20(a) claim. As previously stated, Section 20(a) provides for controlling person liability in reference to any violation of the 1934 Act or a rule or regulation promulgated thereunder. 15

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[45] Complaint ¶ 7 at 20.

[46] *See* p. 1339, *supra*.

[47] *See* p. 1341, *supra*.

[48] *See* footnote 33, *supra* at 1341; pp. 1339-1340, *supra*.

U.S.C. § 78t. The limitations period for the 20(a) claim will be the same as the limitations period that would govern the claim against the controlled person. *See Herm v. Stafford*, 663 F.2d at 679. Consequently, until Stritzinger amends his complaint to set forth which persons or entities Equitable controlled and which sections of the securities laws such persons violated, the Court cannot determine what statute of limitations governs his Section 20(a) claim.

Furthermore, for the same reasons previously set forth, the Court is unable to determine when Stritzinger's claims based upon Sections 15 and 20(a) accrued.[49] Consequently, the Court must reserve judgment on whether Stritzinger's claims under these sections are barred by the applicable limitations period.

THE MERITS OF THE PLAINTIFFS' CLAIMS

At this juncture, the Court will discuss the merits of the securities laws claims as they pertain to both Wilmington House and Eagle. The defendant banks argue that the plaintiffs have failed to state any cause of action under the securities laws, and hence the Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

First, both Count I and Count V of the Complaint are based, in part, on Section 17(a) of the 1933 Act. However, this Court in *Hill v. Der*, a case involving the same plaintiffs and the same securities that are involved in this case, held that Section 17(a) does not give rise to a private right of action for damages. 521 F.Supp. at 1378. The Court will adhere to this prior decision. Therefore, the plaintiffs' claims based upon Section 17(a) of the 1933 Act will be dismissed.

Second, both Count I and Count V are based, in part, upon Sections 15(b) and 15(c) of the 1934 Act (15

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[49] *See* p. 1341.

U.S.C. § 78o(b)(c)). These two sections deal exclusively with the regulation of brokers and dealers. Under Sections 3(a)(4) and (5) of the 1934 Act, however, a bank is not a broker or dealer. 15 U.S.C. §§ 78c(a)(4), (a)(5); *see also* 15 U.S.C. § 78c(a)(6). Once the defendants' status as a bank is demonstrated, the provisions of Section 15(b) and 15(c) are not applicable. *Cf., Capital Funds, Inc. v. SEC*, 348 F.2d 582, 586-587 (8th Cir. 1965). There is no question that both Mercantile and Equitable are banks within the meaning of the 1934 Act. Consequently, those claims based upon Sections 15(b) and 15(c) of the 1934 Act will be dismissed.

Third, both Count I and Count V seek punitive damages as a form of relief. This Court in *Hill v. Der* already has held that punitive or exemplary damages are not recoverable under the federal securities laws. 521 F.Supp. at 1390-1391. The Court will adhere to this prior decision. Accordingly, those portions of Counts I and V which seek punitive or exemplary damages will be dismissed.

Furthermore, as it stands now, the Complaint does not satisfy Fed.R.Civ.P. 9(b) which requires that claims pertaining to fraud must be stated with particularity. Indeed the Complaint does not, for the most part, satisfy the simple notice pleading requirements of Fed.R.Civ.P. 8. In short, the Complaint is virtually incomprehensible. If the plaintiffs' claims were predicated solely on what is currently before the Court, further relief for the defendants might be warranted at this time. There is very little presently in the Complaint upon which liability under the securities laws could be predicated. In their briefs, and at oral argument, however, the plaintiffs have proffered additional information that may impact upon their case.

Therefore, rather than dismissing the case, the Court will give the plaintiffs the opportunity to amend their

Complaint. Inasmuch as the plaintiffs have informed the Court that they have substantial additional information that supports their claims, the plaintiffs will be permitted thirty (30) days for additional discovery to flesh out the specifics of their claims. At the end of this thirty day period, the plaintiffs shall file an Amended Complaint which satisfies Fed.R.Civ.P. 8, 9(b) and the other criteria set forth in this Opinion.

The Amended Complaint should set forth with particularity each alleged violation of the securities laws in a separate count. In addition, any claim based upon a conspiracy to violate the securities laws or upon a theory of aiding and abetting a primary violation of such laws should also be set forth with particularity in a separate count. If, after the filing of the Amended Complaint, the defendants wish to renew their motions to dismiss, they will be free to do so.

An Order will be entered in accordance with this Opinion.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3575

JOHN T. HILL, DESCOMP, INC., DATA CONTROLS NORTH, INC., VIRGIL AND MARIE SCOTT, THOMAS L. AND PATRICIA A. RUGER, AND JAMES R. STRITZINGER,

vs.

THE EQUITABLE TRUST COMPANY AND MERCANTILE SAFE DEPOSIT & TRUST COMPANY

John T. Hill, Thomas L. Ruger,
Patricia A. Ruger, Virgil Scott,
Marie Scott, James R. Stritzinger
Descomp, Inc., and Data Controls North Inc.,
Appellants

(D.C. Civ. No. 82-220)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF DELAWARE

Present: WEIS, GREENBERG and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel March 7, 1988 and submitted on rebriefing May 6, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 22, 1987, and July 31, 1987, be, and the same is hereby affirmed. Costs taxed against

the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Jarvis
Clerk

July 14, 1988

Certified as a true copy and
issued in lieu of a formal
mandate on August 12, 1988

TEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3575

JOHN T. HILL, DESCOMP, INC., DATA CONTROLS NORTH, INC., VIRGIL AND MARIE SCOTT, THOMAS L. AND PATRICIA A. RUGER, AND JAMES K. STRITZINGER,
Appellants

v.

THE EQUITABLE TRUST COMPANY AND MERCANTILE SAFE DEPOSIT & TRUST COMPANY

(D.C. Civil No. 82-220)

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, and SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, ALDISERT and WEIS, *Circuit Judges*

The petition for rehearing filed by appellants Data Controls North, Inc., Virgil and Marie Scott, and Thomas L. and Patricia A. Ruger, in the above-entitled case hav-

ing been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Seitz would grant rehearing by the court in banc.

BY THE COURT

/s/ Morton A. Gruby
Circuit Judge

Dated: Aug. 4, 1988.

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

Case Number: C.A. 82-220

JOHN T. HILL, *et al.*

v.

THE EQUITABLE TRUST COMPANY

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT, EQUITABLE TRUST COMPANY, AND AGAINST PLAINTIFFS THOMAS L. RUGER, VIRGIL SCOTT, MARIE SCOTT, JAMES R. STRITZINGER AND DATA CONTROLS NORTH, INC.

The counterclaims were not tried before the jury. By agreement of the parties, judgment on the counterclaim is entered in favor of defendant Equitable Bank in the following amounts:

1. As of May 22, 1987, Thomas L. Ruger and Patricia L. Ruger owe defendant $29,578.88. The amount of the judgment increases by $6.74 per day from May 23 until payment is made to reflect increases in the interest owed.

2. As of May 22, 1987, Virgil Scott and Marie Scott owe defendant $26,867.83. The amount of the judgment increases by $6.14 per day from May 23 until payment is made to reflect increases in the interest owed.

3. As of May 22, 1987, Descomp, Inc. owes defendant $112,601.12. The amount of the judgment increases by $17.83 per day from May 23 until payment is made to reflect increases in the interest owed.

4. As of May 22, 1987, John T. Hill owes defendant $34,638.54. The amount of the judgment increases by $7.11 per day from May 23 until payment is made to reflect increases in the interest owed.

5. As of June 19, 1987, James R. Stritzinger owes defendant $120,770.81. The amount of the judgment increases by $20.23 per day from June 20 until payment is made to reflect increases in the interest owed.

/s/ Caleb M. Wright
J.

FORM OF JUDGMENT APPROVED in accordance with RULE 58 FRcvP.

June 22, 1987
Date

J. R. McAllister, Jr.
Clerk

/s/ Alice V. Williams
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action 82-220 CMW Consolidated

JOHN T. HILL, *et al.*,
Plaintiffs,

v.

EQUITABLE BANK, N.A.,
Defendant.

ORDER

This 31st day of July 1987, the Court having considered plaintiffs' Motion to Alter or Amend Judgment, pursuant to Fed.R.Civ.P. 59(e), and there being no opposition from defendant,

IT IS HEREBY ORDERED that plaintiffs' Motion to Alter or Amend Judgment is granted. As of the date of judgment, the interest on the amounts due defendant are calculated under the method set out in 28 U.S.C. § 1961. The per diem increases in amounts owed, listed in the originally filed judgment, are to be disregarded as of the date of judgment.

/s/ Caleb M. Wright
UNITED STATES DISTRICT CT. JUDGE

Respectfully Submitted.

GOLDMAN, KRUGER, KOVELANT
& HOLLMANN
308 Second Street
Laurel, Maryland 20707
(301) 490-1000

/s/ Douglas Clark Hollmann
DOUGLAS CLARK HOLLMANN,
ESQUIRE

APPENDIX H

STATUTE

MARYLAND CORPORATIONS AND ASSOCIATIONS ARTICLE

§ 11-703. Civil liabilities.

(a) *When seller is liable.*—A person is civilly liable to the person buying a security from him if he:

(1) Offers or sells the security in violation of §§ 11-304 (b), 11-401, or 11-501 of this title, or of any rule or order under § 11-205 of this title which requires the affirmative approval of sales literature before it is used; or

(2) Offers or sells the security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and if he does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

(b) *Extent of liability.*—(1) A buyer may sue either at law or in equity:

(i) On tender of the security, to recover the consideration paid for the security, together with interest at 6 percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security; or

(ii) If he no longer owns the security, for damages.

(2) Damages are the amount that would be recoverable on a tender less the value of the security when the buyer disposed of it and interest at 6 percent per year from the date of disposition.

(c) *Others jointly and severally liable with seller.*—(1) Every person who directly or indirectly controls a seller liable under subsection (a) of this section, every partner, officer, or director of the seller, every person occupying a similar status or performing similar functions, every employee of the seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(2) There is contribution as in cases of contract among the several persons so liable.

(d) *Time of making tender.*—Any tender specified in this section may be made at any time before entry of judgment.

(e) *Survival of cause of action.*—Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(f) *Limitation of actions; effect of offer or refund.*—(1) Except as provided in paragraph (2) of this subsection, a person may not sue under this section more than three years after the contract of sale.

(2) An action may not be maintained:

(i) To enforce any liability created under subsection (a)(1) of this section, unless brought within one year after the violation on which it is based; or

(ii) To enforce any liability created under subsection (a)(2) of this section, unless brought within one year after the discovery of the untrue statement or omission, or after the discovery should have been made by the exercise of reasonable diligence.

(3) A person may not sue under this section:

(i) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 6 percent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt; or

(ii) If the buyer received the offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

(g) *Effect of making or performing contract with knowledge of facts.*—A person may not base any suit on any contract if he:

(1) Has made or engaged in the performance of the contract in violation of any provision of this title or any rule or order under this title; or

(2) Has acquired any purported right under the contract with knowledge of the facts by reason of which its making or performance was in violation.

(h) *Provision for waiver of compliance with section void.*—Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or any rule or order under this title is void.

(i) *Rights and remedies additional to others.*—The rights and remedies provided by this title are in addition to any other rights or remedies that may exist at law or in equity, but this title does not create any cause of action not specified in this section or § 11-410 of this title. (An. Code 1957, art. 32A, § 34; 1975, ch. 311, § 2.)

MARYLAND COURTS AND JUDICIAL PROCEEDINGS ARTICLE

§ 5-203. Ignorance of cause of action induced by fraud.

If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud. (An. Code 1957, art. 57, § 14; 1973, 1st Sp. Sess., ch. 2, § 1.)